

**THE
SCHOOL**

**OF
SCIENCE
AND
ART**

WILLIAM MORRIS

1861-1923

(23,890)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 739.

THE ROMAN CATHOLIC CHURCH OF SAINT ANTHONY
OF PADUA, JERSEY CITY, APPELLANT,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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United States District Court, District of New Jersey.

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA

vs.

On Bill, &c.

THE PENNSYLVANIA RAILROAD CO.

Docket Entries.

1910, July 27, Bill filed.

- " " " Subpoena issued, returnable Sept. 5, 1910.
- " " 30, Affidavit of service of Bill of Complaint, filed.
- " " " Subpoena returned, served, and filed.
- " Aug. 2, New subpoena issued, returnable Sept. 5, 1910.
- " 9, " " returned, served, and filed.
- " Oct. 3, Appearance of Vredenburg, Wall & Carey, for Defendant, filed.
- " 3, Demurrer filed.
- " 11, Order setting down demurrer for argument filed.
- " 11, Notice of argument of Demurrer filed.
- " 22, " " " " " "
- " Nov. 7, Hearing on Demurrer; Decision reserved.
- " Dec. 9, Order for amendment to bill of complaint filed.

1911, Apr. 25, Memorandum filed.

- " May 2, Order overruling Demurrer with costs.
- " 4, Complainant's costs on demurrer taxed \$2.40 and filed.
- " 23, Answer filed.
- " June 3, Replication filed.
- " 15, Order appointing examiner filed.
- " Sept. 8, Order extending time for taking proofs, filed.
- " Dec. 12, Notice of Final Hearing filed.
- " 26, Complainant's proofs filed.
- " " " Defendant's " "

1912, Mar. 30, Notice of Final Hearing filed.

- " Apr. 15, Stipulation that cause may be marked ready for hearing filed.
- " June 5, Final hearing; Decision reserved.
- " July 18, Consent and order substituting Frank M. Hardenbrook for Complainant, filed.
- " 22, Order denying motion for leave to amend bill of complaint, filed.

1913, Feb. 4, Judge Rellstab announced in open court that he found for defendant.

- " " 15, Final Decree dismissing bill with costs, filed.
- " " Objections to form of decree, filed.
- " " 24, Assignment of Errors filed.
- " " " Appeal and Allowance filed.
- " " " Bond on Appeal filed.
- " " 26, Citation issued. Copy filed.

The Circuit Court of the United States, District of New Jersey.

THE ROMAN CATHOLIC CHURCH OF SAINT
ANTHONY OF PADUA,
AGAINST
THE PENNSYLVANIA RAILROAD COMPANY.

} In Equity.

Bill of Complaint.

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(*Filed July 27, 1910.*)

To the Honorable William M. Lanning, Judge of the Circuit Court of the United States, District of New Jersey:

The Roman Catholic Church of Saint Anthony of Padua of the city of Jersey City, Hudson county, New Jersey, a religious corporation organized and existing under the laws of the State of New Jersey, and an inhabitant of the State of New Jersey, brings this, its bill against The Pennsylvania Railroad Company, 20 a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and having its principal office at the city of Philadelphia, in the State of Pennsylvania, and an inhabitant of the State of Pennsylvania.

And your orator shows unto your Honor:

I. That your orator is a religious corporation engaged in religious, educational and charitable work since the year one thousand eight hundred and eighty-four, upon the lands and premises hereinafter described and owned by it.

II. That the defendant was duly incorporated under the laws 30 of the State of Pennsylvania on the thirteenth day of April, in the year eighteen hundred and forty-six, as a common carrier, with authority to lease, hold and operate a line of railway in the States of Pennsylvania and New Jersey, and as such at all the times hereinafter mentioned has maintained and operated and still maintains and operates a railroad, with its main and side tracks, locomotives, freight and passenger cars upon what is known as Sixth street, in the city of Jersey City, Hudson county, New Jersey.

III. That on the twentieth day of December, in the year eighteen hundred and eighty-four, your orator became, and from thence hitherto has been, and now is, the owner in fee simple

absolute of those three certain lots in the city of Jersey City, county of Hudson, and State of New Jersey, which on a certain map of that part of the Town of Jersey, commonly called Aharsimus, made by Joseph F. Margin and filed in the clerk's office of the county of Bergen, A. D. eighteen hundred and four, are known and distinguished as lots numbered five, six and seven, in block numbered two hundred and fifty; said lots are also numbered five, six and seven in block numbered three hundred and ninety on Bacot's Map of Jersey City, made in eighteen hundred
10 and sixty-one, and which is now on file in the office of the register of said county of Hudson. The said lots are each twenty-five feet wide in front and rear and one hundred feet in depth throughout, and front on the westerly side of Monmouth street, and immediately thereafter your orator caused to be erected thereon, at a large cost, a church edifice and since which time your orator has held continuously religious services therein.
IV. That on the tenth day of May, in the year eighteen hundred and ninety-three your orator became, and from thence hitherto has been, and now is, the owner in fee simple absolute
20 of that certain lot of land in the city of Jersey City, Hudson county, New Jersey, and known and designated as lot nine, in block two hundred and fifty, now city block three hundred and ninety, being on the north side of Sixth street, one hundred feet west from the northwest corner of Sixth and Monmouth streets, twenty-five feet by one hundred feet; on Map of Town of Ahrasimus, made by Joseph Margin and filed in the office of the county of Bergen, eighteen hundred and four, and your orator caused to be erected thereon at a large cost a residence for the officiating priests attached to and connected with said church so
30 erected by your orator, as aforesaid, and since which time said residence has been continuously occupied as a home by the said priests.

V. That on the eleventh day of June, in the year eighteen hundred and ninety-eight, your orator became, and from thence hitherto has been, and now is, the owner in fee simple absolute of those four certain lots of land in the city of Jersey City, Hudson county, New Jersey, and known and designated as lots seventeen, eighteen, nineteen and twenty, in block two hundred and fifty, on Map of the heirs of J. B. Coles and Bagot Map; running along Brunswick street one hundred feet; thence easterly parallel with Sixth street, one hundred feet; thence southerly one hundred feet; thence westerly one hundred feet, and immediately thereafter your orator caused to be erected thereon a
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parochial school for educational purposes, and since which time the said school building has been continuously used as a school for upwards of eleven hundred children.

VI. That on the eighth day of August, in the year nineteen hundred and two, your orator became, and from thence hitherto has been, and now is, the owner in fee simple absolute of that certain lot of land on the northerly side of Sixth street, in the city of Jersey City, Hudson county, and State of New Jersey, and being twenty-five feet wide in front and rear by one hundred feet in depth and known and designated as lot ten, in block three 10 hundred and ninety upon a map of Jersey City filed in the office of the register of the county of Hudson, in the year eighteen hundred and sixty-one, and known as the Bacot Map, and immediately thereafter your orator caused to be erected thereon an addition to the residence of the officiating priests connected with your orator's said church as set forth in paragraph IV of this bill.

VII. That on the twentieth day of March, in the year nineteen hundred and five, your orator became, and from thence hitherto has been, the owner in fee simple absolute of that certain lot 20 of land on the southerly side of Seventh street, in the city of Jersey City, Hudson county, New Jersey, and being twenty-five feet in width in front and rear and one hundred feet in depth, and known and designated as lot thirty-one, in block two hundred and fifty, as the same appears on a certain map of lands of the heirs of J. B. Coles on file in the office of the register of Hudson county, New Jersey.

VIII. And that immediately after becoming the owner of the lands described in paragraph VII of this bill your orator caused to be erected thereon at large expense a home and residence for 30 the sisters and female teachers connected with the said church and school so erected by your orator, as aforesaid, and since which time said residence has been continuously used and occupied as a home by the said sisters and female teachers.

IX. And your orator further shows that the said buildings so erected by your orator are of substantial and costly construction and which are, except for the acts of the defendant, hereinafter complained of, convenient, pleasant and healthful, and only adapted and used for the respective purposes aforesaid, and that the immediate neighborhood of the same has long been, and now 40 is, thickly populated and exclusively a residential district.

X. That the said defendant for upwards of the six years last past in the operation of its said railroad has maintained and

operated upon said Sixth street, and immediately to the south of the said lands, premises and structures of your orator, a line of railroad track upon which it operates a great number of freight and passenger trains, cars, switch engines and locomotives, which continuously at all hours of the day and night pass upon said tracks the lands, premises and structures of your orator as aforesaid, each making its characteristic noises and which locomotives attached to said trains and engines connected therewith are now burning, and for upwards of the past
10 six years have continuously burned, vast quantities of what is known as soft or bituminous coal, and from the burning and partial combustion of which there arises and continuously for upwards of the past six years has arisen from the smoke stacks connected with said locomotives and engines large and dense volumes of black smoke, soot, cinders, carbon, ashes, particles of unconsumed coal, coal dust and noxious, unwholesome gases, offensive odors and vapors, which are carried to, over, into, upon and through the lands, premises and structures of your orator so owned, used and occupied by it as aforesaid, discoloring the
20 glasses, thereby seriously interfering with light, and causing annoying and irritating flashes as the sun strikes the said smoke, soot and gases so in the air as aforesaid; injuring, damaging and destroying the carpets, curtains, furnishings, pictures and decorations contained therein; blackening, discoloring, damaging and destroying the roofs of said structures and the paint upon the inside and outside thereof, and clogging, corroding, perforating and damaging the leaders and gutters leading from said roofs and depriving your orator of the use of the outside of some of said structures for laundry purposes, thereby causing your orator
30 great damage and expense, and which now are and at all the times aforesaid have impregnated, contaminated and rendered impure, corrupt, offensive, unwholesome and unhealthful the air in and around the premises and structures of your said orator, depriving it and the congregation and members of said church, and the visitors thereto and the priests connected therewith, as well as the scholars, pupils and teachers connected with and attending said school of the use and comfortable enjoyment of the same to which they are legally entitled, injuring, damaging and destroying their clothing, and the said premises and structures of
40 your orator have been, and are now being, seriously injured and rendered uncomfortable and less desirable for church, school or residence purposes and the health, comfort and rest of said

priests, pupils, teachers and members of said church seriously impaired, threatened and injured and the reasonable use of the same interfered with and impaired, to the damage of your orator in the sum of fifty thousand dollars.

XI. That the said acts of the defendant have taken from your orator property consisting of the easement of light and air to which your orator is legally entitled, and deprives it of the same without due process of the law, and without just compensation, or any compensation whatever, and that such acts of the defendant in such interference with and appropriation of said property 10 of your orator has been, and now is, a violation of the provisions of the Constitution of the United States.

XII. That the aforesaid acts, use, occupation of and appropriation by the defendant as aforesaid constitute and are a nuisance to and one of special injury to your orator, and are unnecessary, avoidable and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad, and which acts are continuous, and which will cause great and irreparable loss to your orator and subject your orator to the prosecution of a multiplicity of suits for damages 20 unless the defendant be restrained by injunction from the commission thereof.

XIII. All of which acts and doings of the said defendant are contrary to equity and good conscience, and tend to the manifest injury and oppression of your orator in the premises.

In Consideration Whereof and for as much as your orator is remediless in the premises at and by the strict rules of the common law can only have relief in a court of equity where matters of this nature are properly cognizable and relievable.

To the end therefore your orator prays that the said defendant 30 may deem to pay to your orator the sum of fifty thousand dollars damages as your orator has suffered by reason of the premises, and that your Honor grant unto your orator a writ of injunction commanding the said defendant, its agents, servants and employees to absolutely desist and refrain from so operating its said railroad, locomotives and engines as to cause or permit black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives to fall upon or enter into the premises and structures of your said orator in 40 such appreciable quantities as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the same by your orator and the priests connected therewith

and persons using the said respective structures of your orator; and that a writ of subpoena issue against the defendant, The Pennsylvania Railroad Company, requiring it to appear in this Court and answer this bill of complaint, but without oath, all answer under oath being expressly waived, and to stand by such orders and decrees as the court may from time to time adjudge and enter in the premises, and that your orator have such other and further relief as to the court may seem proper and as may be necessary to fully protect and enforce the right and equities
10 of your orator.

GEORGE J. McEWAN,
Solicitor for Complainant and of Counsel.

STATE OF NEW JERSEY, }
County of Hudson, }ss:

BOLESLAW KWIATHKOWSKI, being duly sworn on his oath says that he is the Pastor and Secretary of the Roman Catholic Church of Saint Anthony of Padua, the foregoing complainant; that the matters and things therein set forth, so far as they relate
20 to the acts and deeds of the said complainant are true, and so far as they relate to the acts and deeds of any other person or persons, corporation or corporations, he believes them to be true.

BOLESLAW KWIATHKOWSKI,
Pastor.

Sworn and subscribed to before me this 26th day of July,
A. D., 1910.

FRANK M. HARDENBROOK,
Master in Chancery of New Jersey.

Circuit Court of the United States, District of New Jersey.

THE ROMAN CATHOLIC CHURCH OF SAINT
ANTHONY OF PADUA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Defendants.

} In Equity.

Answer.

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(*Filed May 23, 1911.*)

The answer of THE PENNSYLVANIA RAILROAD COMPANY, the above named defendants to the bill of complaint exhibited against them by the above named complainant.

These defendants now, and at all times hereafter, saving and reserving to themselves all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as these defendants are advised that it is material or necessary for them to make answer unto, answering, say:

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1. These defendants, answering paragraphs one, three, four, five, six, seven, eight and nine of said bill of complaint, say: That they do not know and cannot set forth as their belief or otherwise, whether the statements of facts set forth in said paragraphs of said bill of complaint are true; but that they have no reason to doubt that the complainant is, and, since eighteen 30 hundred and eighty-four, has been, engaged in religious and educational work upon a portion of the land described in the bill of complaint, and has erected thereon buildings of a substantial construction.

2. These defendants, answering paragraph two of the bill of complaint, say: That they admit the statement as to the incorporation of these defendants as a common carrier; and their authority to lease, hold and operate a line of railroad in the States of Pennsylvania and New Jersey. But they deny that they as such, or in any other capacity, and at all the times or at any of the times mentioned in the bill of complaint, or at any other time, have maintained or operated, or that they still maintain and operate a railroad with its main or side tracks, locomotives,

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freight and passenger cars, upon what is known as Sixth Street in Jersey City, Hudson County, New Jersey.

3. These defendants, answering paragraphs ten, eleven and twelve of the said bill of complaint, say: That they deny the truth of the statements set forth in said paragraphs, and of each and every one of said statements; and they say that they never have maintained or operated, and do not now maintain or operate any railroad upon Sixth Street, in Jersey City, and that they have not for upwards of six years last past, in the operation of
10 their railroad, maintained or operated upon said Sixth Street a line of railroad tracks, or any railroad tracks, or any freight or passenger trains or cars or switch engines or locomotives of any kind or character.

These defendants say that, under their charter rights and in the execution of their powers, and by force and virtue of the several acts hereinafter mentioned, they did survey, lay out and locate their railroad on the several courses set down in such survey, and did construct a railroad between the points in the said Acts set forth; and that after the construction of said
20 elevated railroad, these defendants, in order to carry into effect the objects of the incorporation of the united companies herein-after mentioned, did use the said railroad so constructed on its surveyed route, in the prosecution of their said business as a common carrier of passengers and freight, and continued the same during the times mentioned in the said declaration, and a long time prior thereto, as hereinafter mentioned, as they lawfully might do, for the causes aforesaid; and did necessarily operate thereon a great number of freight and passenger trains, switch engines and locomotives, and did thereby necessarily
30 create some smell and some noise, and did necessarily shift and distribute their cars, and did necessarily blow the whistles of their locomotives, and did necessarily start and stop with trains of cars and back them and start them again, and that each did necessarily make its characteristic noises; and did necessarily cause noise, smoke and vibrations, as they lawfully might do for the causes aforesaid.

4. These defendants, further answering, say: That the Legislature of the State of New Jersey, by an act entitled "An Act to incorporate the New Jersey Railroad and Transportation Company," passed March 7th, 1832 (P. L. page 96), created the New Jersey Railroad and Transportation Company, a body politic and corporate, to exercise all the powers and privileges pertaining to corporate bodies and necessary for the purposes of said Act; and

with all the rights and powers necessary to the construction of a railroad with as many sets of tracks as they may deem necessary, from a point in the City of New Brunswick to a point on the Hudson River, opposite the City of New York, and to take possession of any land needed for the site of the said road, and to acquire the same by purchase or condemnation in fee simple, with power, when said railroad was constructed, to charge tolls and rates for the passage of all carriages upon said railroad, and to make regulations for the collection and levying of the same; and to regulate the time and manner for transporting goods and passengers and for collecting tolls on the said railroad; and also to use thereon engines and carriages of their own for the transportation of persons or any species of property; but, at the end of thirty years, the State might take the said railroad at an appraised value. 10

That, immediately after the passage of the said act, the said New Jersey Railroad and Transportation Company surveyed and filed the route of their railroad from the City of New Brunswick to Jersey City, opposite the City of New York, and acquired the land and constructed a railroad thereon, in accordance with the terms of the above-mentioned Act; and, in the month of September, eighteen hundred and thirty-four, opened said railroad as a public highway for the transportation of property and persons between the said termini, and have since maintained and operated said railroad up to the time of the execution of the lease hereinafter mentioned. 20

5. These defendants, further answering, say: That the State of New Jersey, by an act entitled, "An Act to enable the United Railroad and Canal Companies to increase their depot and terminal facilities at Jersey City," approved March 30th, 1868 (P. 30 L. page 551), empowered the said New Jersey Railroad and Transportation Company, and the United Delaware & Raritan Canal Company, and the Camden & Amboy Railroad and Transportation Company to acquire from the State the land under water in Harsimus Cove in Jersey City, lying between high water mark on the west, the deep water of the Hudson River on the east, the center of South Second Street on the north, and the center of South Seventh Street on the south, in the name of the New Jersey Railroad and Transportation Company, and to fill up and improve the same, and erect wharves, piers, store-houses 40 and other buildings and sheds and car and engine houses and appendages, and to build a branch railroad not exceeding one hundred feet in width, from said property so purchased as aforesaid,

to some point in the present line of the New Jersey Railroad, eastward of the deep cut in Bergen Hill, with as many separate tracks and rails as the directors shall deem necessary; with power to procure the right of way for such branch railroad, either by purchase or by appraisement, in the manner prescribed by the original charter, and to make such branch railroad elevated so as to pass over the streets of said city, at least twelve feet in the clear above said streets, in consideration of a sum of money to be paid by said companies to the State of New Jersey, the amount of which was to be ascertained by the Attorney General and three commissioners to be appointed by the Supreme Court.

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That subsequently the Attorney General and said three commissioners did ascertain that the amount which the said companies should pay to the State of New Jersey for the land and powers granted by the said last mentioned Act, was the sum of five hundred thousand dollars; and thereupon the said the New Jersey Railroad and Transportation Company and the other companies paid to the State of New Jersey the said sum of five hundred thousand dollars, and thereafter made a survey of said branch line and filed the route thereof in accordance with law,

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and, at great expense, acquired from the owners thereof, for the purposes of such branch railroad, as provided by said act, a route one hundred feet wide, from a point on the New Jersey Railroad in the deep cut in Bergen Hill, to said lands in Harsimus Cove, and constructed and built on said route an elevated branch railroad; and thereafter erected on the said lands in Harsimus Cove a terminal yard in connection with said branch railroad, with wharves, sheds, and a grain elevator, warehouses and tracks,—all at great expense; and these defendants commenced to operate the said branch railroad and said terminal yard on or about the

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first day of May, eighteen hundred and seventy-two, which work was done and expenditure made with the full knowledge of, and without objection from the owners of all the lands set forth in the said bill of complaint.

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6. And these defendants, further answering, say: That on or about the thirtieth day of June, eighteen hundred and seventy-one, the Delaware and Raritan Canal Company, the Camden & Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company, (commonly called the United Railroad and Canal Companies), by indenture bearing date that day, did grant, demise and to farm let unto The Pennsylvania Railroad Company the above named defendant, all their railroads and appurtenances and real and personal property,

including the said Harsimus Cove property and the said branch line leading thereto, for the full term of nine hundred and ninety-nine years, unless sooner terminated by default in the payment of the rent or taxes.

That by an act entitled "An act to validate and confirm a certain lease and contract between the companies now known as the United New Jersey Railroad and Canal Company, and the Pennsylvania Railroad Company, the said lease was validated, ratified and confirmed; which act was approved March 27th, 1873 (Laws, page 1298). 10

That these defendants have been in possession of the property of the New Jersey Railroad and Transportation Company and of the United New Jersey Railroad and Canal Company, including the said land at Harsimus Cove and the said branch line from Harsimus Cove to the main line in the Bergen cut, under said lease, as lessees thereof, since the year eighteen hundred and seventy-one, and are now in such possession under said lease, and have been during all that time and still are using and operating the same for the transportation of goods and passengers in and across the State of New Jersey, from the city of Philadelphia 20 to the city of New York. That the transportation of goods over the said branch line, since said lease, has been very large and has required the constant use of the same.

7. And these defendants, further answering, say: That the New Jersey Railroad and Transportation Company acquired the land for said route to Harsimus Cove, as filed in the office of the Secretary of State, prior to the year eighteen hundred and seventy-three, in accordance with the terms of their said charter; that some of the persons from whom they acquired said land were at that time also the owners of the lands set forth in the 30 bill of complaint, and that said owners granted to the New Jersey Railroad and Transportation Company the lands in the said route, for use by them and by these defendants as a railroad company in operating and maintaining a railroad thereon in the way and in the manner in which said railroad is now maintained and operated; and that prior to the year eighteen hundred and seventy-three these defendants operated said railroad on said route as filed in the office of the Secretary of State, as said railroad is now operated, and they have, ever since the year eighteen hundred and seventy-three, in the same way and manner, maintained and operated said railroad over said land within said route; and that, from the year eighteen hundred and seventy-three, up to the present time, these defendants have, by 40

force of the franchises of the New Jersey Railroad and Transportation Company above mentioned, derived from the above-mentioned public grants, maintained and operated their railroad and run their trains, carrying merchandise and freight within said route, doing no more damage to the lands adjacent to said route than that which necessarily results from the transaction of such acts and business.

8. And these defendants, further answering, say: That by an act entitled "An act concerning public utilities, to create a Board 10 of Public Utility Commissioners and to prescribe its duties and powers," approved April 21st, 1911, it was, among other things, enacted that the Board provided for by said act should have general supervision and regulation of, and jurisdiction and control of all public utilities, and also over their property, property rights, equipments, facilities and franchises, so far as might be necessary for the purpose of carrying out the provisions of said act, and should, among other things, have power to investigate, upon its own initiative, or upon complaint in writing, any matter concerning any public utility as herein defined, and that the 20 public utility as defined by said act included every corporation which operated or maintained or controlled within the State of New Jersey any steam railroad.

9. And these defendants aver, in addition to the foregoing answer, that they have, for over thirty years, and since the said legislative grant, had actual possession of the lands in said route. uninterruptedly, and have uninterruptedly continued to operate their trains, cars, switch engines and locomotives over the said railroad on said route in the same way and manner as they now maintain and operate the same; and aver that they have acquired, both by statute and by prescription, the right so to do; and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

10. These defendants deny that they have in anywise infringed upon the rights of the complainant as alleged in the said bill of complaint, or otherwise, and deny that the complainant is entitled to any relief whatever, or to any part of the relief in said bill of complaint demanded; and allege that the complainant has no standing in this Court or in any court of equity.

40 And these defendants pray in all things the same benefit and advantage of this their answer, as if they had pleaded to said bill of complaint.

And these defendants deny all and all manner of unlawful

acts whatsoever, whereof they are in anywise by the said bill of complaint charged.

All which matters and things these defendants are ready and willing to prove, as this Honorable Court shall direct; and pray to be hence discharged with their reasonable costs and charges in this behalf most wrongfully sustained.

THE PENNSYLVANIA RAILROAD COMPANY,
by VREDENBURGH, WALL & CAREY,
their Solicitors and Counsel.

10

Circuit Court of the United States, District of New Jersey.

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD COM-
PANY,

Defendant.

In Equity.

20

Replication.

(Filed June 3, 1911.)

This repliant saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto, saith, that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replication; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver maintain and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

30

40

GEORGE J. McEWAN,
Solicitor and of Counsel with Complainant.

United States District Court, District of New Jersey,

ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA,
Complainant,
vs.
THE PENNSYLVANIA RAILROAD COM-
PANY,
Defendant.

19

Complainant's Proofs.

(Filed December 26, 1911.)

It is hereby stipulated and agreed that the signatures of the various witnesses called on behalf of the complainant and defendant to their respective testimony, be and the same hereby is waived.

20

GEORGE J. McEWAN,
Of Counsel for Complainant.
ALBERT C. WALL,
Of Counsel for Defendant.

Testimony taken in the above-entitled matter at hearing before Hon. Geo. R. Beach, Examiner, appointed by virtue of the order of Judge Joseph Cross, dated the 15th day of June, 1911, said hearing held at the office of Mr. Beach, 75 Montgomery Street, Jersey City, June 26th, at ten o'clock A. M.

30 Appearances—GEORGE J. McEWAN, Esq., Solicitor for Complainant; F. M. HARDENBROOK, of Counsel; ALBERT C. WALL, Esq., of Counsel for Pennsylvania Railroad Company, defendant.

It is stipulated that the testimony of the witnesses herein may be taken stenographically, and the signatures of the witnesses waived.

By Mr. Wall—Counsel for the defendant states in answer to letter of counsel for complainant of June 19, 1911, wherein you request the defendant to furnish you with (1) a statement of the kind of coal used for the past six years; and (2) a tabulated statement showing the number of trains passing the church each month for the past six years; Defendant says, in answer to the first question, the grades of coal used are the Greenberg, Avonmore and Lloyd Ell. In answer to the second question, defend-

ant produces a statement entitled "Record showing movement of East and West bound trains over Harsimus Cove Branch, January, 1905, to May, 1911.

Said statement offered in evidence by the plaintiff, and marked "Ex. C. I. J. H. C., June 26, 1911."

By Mr. Hardenbrook—Does the Harsimus Branch lie between Monmouth Street and Brunswick Street, on Sixth Street, for the entire length of the block?

By Mr. Wall—No, the Harsimus Branch is that part of the Pennsylvania Railroad which is the subject of complaint in the 10 bill herein.

By Mr. Hardenbrook—Does the line of the railroad operated by the defendant extend along Sixth Street in an easterly and westerly direction for the entire length of the block between Brunswick Street and Monmouth Street?

By Mr. Wall—The railroad in question is located in the block opposite the block in which the church is located, and extends from Monmouth Street to Brunswick Street, and is called by the defendant the Harsimus Cove Branch.

By Mr. Hardenbrook—I offer in evidence Warranty Deed, 20 Stanley Gollick and Stanislaus Gollick, his wife, to St. Anthony of Padua Roman Catholic Church of Jersey City, New Jersey, dated March 20, 1905, recorded in the Register's office of Hudson County, on the 31st day of March 1905, in liber 899, page 377. Received and marked "Ex. C 2, J. H. C., June 26, 1911."

I also offer in evidence deed from Dennis McCartie, dated March 20, 1884, to the complainant, recorded in the Register's office of Hudson County, New Jersey, on the 9th day of January, 1885, in liber 397 of deeds, page 687, for the premises described in paragraph 3 of the complainant's complaint. Received and 30 marked "Ex. C 3, J. H. C., June 26, 1911."

STANISLAUS KARLOSKY, called as a witness by the plaintiff, having been duly sworn, on oath testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Where do you live? A. 217 Erie Street.

Q. How long have you lived there? A. Five years.

Q. And what is your business? A. Machinist.

Q. Where? A. Over in the subway, New York.

Q. And how long have you been engaged in that business? 40
A. Seven years, now.

Q. Are you a member of the church known as the Roman Catholic Church of St. Anthony of Padua? A. Yes, sir.

Q. Where is that church located?

A. Between Monmouth and Brunswick Streets.

Q. What street is it on? A. It is on Seventh St., no.

Q. Don't you know where it is?

A. I go there to church, but just the street—

Q. That church is located on Monmouth Street, next door to the corner of Sixth, isn't it? A. Yes, sir.

Q. How long have you been a member of that church?

A. Since 1890.

10 Q. And how frequently during that time have you attended church; the Sunday service?

A. Every Sunday, except when I am sick or working; that don't happen very often.

Q. About how often?

A. About an average once every three months or so.

Q. What services on Sundays have you usually attended or do you usually attend? A. Eleven o'clock.

Q. Eleven o'clock in the morning? A. Yes, sir.

Q. And have you attended any other services on Sunday?

A. Once in awhile the 7:30 service.

Q. In the evening? A. Yes, sir.

Q. You say once in awhile, how often would that be?

A. Two or three times a month.

Q. And that has been continuous during your entire membership of the church? A. Yes, sir.

By Mr. Wall—I ask that that question be stricken out as leading.

Q. Do you attend any services, or have you attended during that time, services during the week days?

30 Q. A. Not unless it is a church holiday; comes a few times a year; I can't say exactly what days, but once in awhile we have Forty Hours, that is once a year, and then it happens some Church holidays in between, I can't tell what months.

Q. How many Church holidays a year have you attended the Church on week days?

A. I could not just say how many; in the month of May we have services every night; September we have service every night.

Q. I asked you what service you personally attended?

40 Q. A. I attend the evening service sometimes.

Q. How often would you attend the services during the weeks—that is the church holidays during week days?

A. Whenever there is a holiday I go.

Q. And about how many of those would there be in a month?

A. Some months there isn't any; other months we have one; I could not say just how many.

Q. You couldn't remember or tell about how many in the course of a year, could you?

A. Not exactly; I think about twelve, anyway.

Q. Have you attended vespers in the evening during week days during that time at all? *A.* No, I have not got the time.

Q. You are familiar with the location of the Pennsylvania Railroad, which is operated along Sixth Street? *A.* Yes, sir. 10

Mr. Wall—Objected to as containing a false assumption of fact.

Q. You are familiar with the location of the Pennsylvania Railroad there? *A.* Yes, sir.

Q. State where the Pennsylvania Railroad is with reference to this church which you attend?

A. Yes, sir; the railroad runs right along the street alongside the church.

Mr. Wall—I ask that that question be stricken out as the witness is not qualified to testify as to the location of the railroad with reference to street lines; he can give the general location of the railroad as he sees it, but he is not qualified as a surveyor, or otherwise, to make any such answer as he has just made. 20

Q. Do you know where the railroad is with reference to the church? *A.* Yes, sir, I certainly do.

Q. State where it is with reference to the church?

A. It runs right along the street where the church stands.

Q. What street does the church stand on?

A. On Brunswick—I don't know exactly, I go there, but I 30 don't know the street.

Q. Does the railroad pass the church?

A. It runs along the street by the church.

Q. State what you have observed at the times you have been there in reference to the operation of this railroad—what have you seen? *A.* That railroad is a nuisance there.

(Answer stricken out.)

Q. State what you have observed in relation to the operation of the railroad, what you have seen?

A. I don't know just what you mean? 40

Q. What have you seen? *A.* I see a lot of dirt in there.

Q. Well, that is what I am asking you, tell us what you saw?

A. Nothing else but dirt; you go in there with your clothes clean and come out looking like a man from a coal mine; that is what I did see.

Q. Have you ever seen locomotive engines standing on this track between Monmouth and Brunswick Streets?

Mr. Wall—Objected to as incompetent and irrelevant and—

Question withdrawn.

Q. You have seen the railroad operated in that locality, haven't 10 you? A. Yes, sir.

Q. Now, I want you to state so that the stenographer can make a record of it, I want you to state what you have seen in relation to the operation of that railroad?

A. I just said a minute ago I didn't see nothing but a lot of dirt in it.

Q. In connection with the operation of the railroad?

A. Yes, sir. The church has only been painted a couple of years and now it is all dirty, looks like a coal mine; we have to pay for all those improvements all the time in the church; we 20 stand for all the improvements and expenses, we have to pay for the painting and stuff, and the church is all dirty now.

Q. I ask again, what have you seen in connection with the running of the railroad?

Mr. Wall—Objected to, he is not qualified to pass on the running of the railroad.

Mr. Hardenbrook—The question was, what has he seen?

Q. Can't you describe what you have seen?

A. I don't exactly understand what you are trying to get at.

30 Q. Can you describe what you have seen with relation to the running of that railroad?

A. I seen the engines, see them shifting cars all day long from morning till night, and all night, too; nothing else on the railroad but the engines; nothing else you could see on the railroad but the engines.

Q. Cars, aren't there?

A. Yes, cars; couldn't have cars without the engines.

Q. Could have cars without engines, couldn't they?

A. Yes, sir, on electric roads, not steam roads.

40 Q. Well, what have you seen in connection with the operation of these engines? A. Shifting cars.

Q. That is all you have seen?

A. Shifting cars and coal, nothing else I can describe.

Q. What have you noticed in the church in any particular, inside the church? A. I noticed a lot of dirt.

Q. What kind of dirt? A. Stuff from the engine.

Q. What kind of dirt? A. Dirt from the engine.

Q. Can you describe it? A. Stuff come out of the chimney.

Q. Can you describe it?

A. It is like the dirt comes out of the chimney of an engine.

Q. Where have you seen this?

A. On the seats and walls, posts and all over.

Q. And what is the general character of that dirt which you 10 have seen in the church, can you describe it?

A. No, I couldn't exactly describe it.

Q. Is it green, or red, or yellow, or what? A. It is black.

Q. What else is it besides black? A. It is black, that's all.

Q. What quantities of it have you seen in the church, about—very little, or very much?

A. Sometimes you see more than others on account of which way the wind blows; if the wind blows north you get more; if the wind blows the other way you get less.

Q. Could you give any idea as to the quantities you have seen 20 in there.

A. Well, some Sundays you can run finger along in there like that and your finger is all black, all dirty.

Q. On the seats, you mean? A. Yes, sir.

Q. How about the floors, carpets?

A. I don't know about the floors; when you kneel down you can see it on your pants.

Q. Have you ever observed any of this substance coming in through the windows of the church A. Yes, sir.

Q. The windows facing the railroad? A. Yes, sir.

Q. How many windows are there there about, facing the railroad? A. Nine or ten windows on one side.

Q. How frequently have you observed this substance coming in through those windows, how often have you noticed that?

A. Every time an engine passes there.

Q. And for what length of time have you observed that, for how many years? A. Driving cars there?

Q. For how many years? A. I only noticed that for the last five years back; didn't have that before.

Q. Did you notice where this substance that came through the windows, did you see where it came from?

A. You could see it came from the railroad; the windows is just about as high as the railroad.

Q. You say it came from the railroad *A.* Yes, sir.

Q. Have you ever noticed the engines standing there for any particular length of time?

Mr. Wall—Objected to as before on the ground of leading.

Question stricken out.

Q. Have you ever been in the rectory, the house occupied by the priest, connected with the church, on Sixth Street?

A. Yes, sir.

10 *Q.* How frequently have you been in there?

A. I don't go in there very often.

Q. Answer my question; how frequently have you been in there?

A. I don't know what you mean by that; I can't tell you, I don't go there very often.

Q. Would it be once a day, once a week or once a year?

A. Whenever I have any business, about once or twice a year.

Q. For about how many years?

A. Ever since 1890, I am connected with that church.

20 *Q.* What have you observed while in the rectory as to this substance which you saw coming into the church?

A. I didn't exactly take any notice in the rectory, because when I go in there I do my business and come out; I don't look around.

Q. What effect, if any, has this substance, such as you found on the seats and on the carpet, had upon your clothing; have you noticed any effect it had upon your clothing?

A. It eats the clothes right up, just like gas or something; like you put acid on your clothes.

30 *Q.* How frequently have you got it on your clothing?

A. Yes, sir.

Q. I said how frequently? *A.* I don't know just know.

Q. You don't have to state exactly; about, I said? •

A. Every Sunday you get that.

Q. What have you observed, if anything, as to the noise while in the church?

A. The engines shift the cars there and make such a noise that sometimes you can't hear what the pastor says; if you happen to be back in the church you can't hear anything; the

40 *Q.* engine is shifting cars all the time about the time the service is going on, and unless you are very near the pastor you can't hear.

Q. And that noise you hear is due to what so far as you know, you say the shifting of cars?

A. Yes, sir; shifting cars there all the time.

Q. Can you describe this noise due to the shifting of cars?

A. Bumping cars, one against the other, and the engines exhausting the steam, and you can't hear nothing, and running the cars on the tracks bumping over the switches and frogs.

Q. What noises other than the exhausting of steam and the bumping of cars have you heard?

A. Why, running over the frogs and switches makes more noise than running over the smooth rails.

Q. Have you heard any other noises than those you have 10 designated? *A.* No, sir.

Q. How frequently, during the past six years, has the noise been so excessive, the noise which you have described, been so excessive as to prevent your hearing the priest?

A. That has been every Sunday. When I work nights and come in about ten o'clock I got to hurry to get to 11 o'clock mass, and I have to be back at the door, and can't hear a thing.

Q. You testified that you have attended church service in the evening, have you not? *A.* Yes, sir.

Q. What have you noticed as to this noise in the evening? 20

A. It is not so much on Sunday evening as in the morning, but there is just as much or more during the week in the evening as on Sunday, and more if anything.

Q. What have you noticed as to this dirt which you have described?

A. Just as much or more during the week than on Sunday; there is more work going on in the week.

Q. Now, aside from this dirt, which you have described, have you noticed anything else coming in through the windows?

A. Yes, sir; white stuff comes in there, just like paper been 30 burned to powder; it comes through too.

Q. Have you noticed anything else come in there in addition to this dirt, this cinders? *A.* No.

CROSS-EXAMINATION, by Mr. WALL:

Q. Have you been employed as a blacksmith all these years?

A. Yes, sir.

Q. Where? *A.* In the subway of New York.

Q. Where were you employed by them, where do you work?

A. Down in the subway.

Q. Whereabouts in the subway?

A. The 148th street yard.

Q. And how long have you been there?

A. Since the last five years; been working on the Erie Railroad before that; before that I worked on the New Jersey Central.

Q. What work did you do for the Erie? A. On the signals.

Q. Whereabouts? A. In the Jersey City terminal there.

Q. And what work did you do for the New Jersey Central?

A. Same thing.

Q. Were you in the signal tower?

10 A. No, installing new signals, from Jersey City to Mauch Chunk; been working on construction work, installing new signals.

Q. Now, you don't mean to say, Mr. Karlosky, that you noticed that same substance come in through the windows every time an engine passed within the last five years, did you?

A. Yes, sir.

Q. You meant to say that? A. Yes, sir.

Q. You do? A. The dirt has been there.

20 Q. Now, think about that question, are you quite sure that you meant to say that that substance came in through the windows every time an engine passed during the last five years, is that true or not? A. Yes, sir.

Q. You say that is true?

A. Yes, sir; it is a fact that dirt is coming through those windows ever since the church was there and the railroad there, but there was not so much of it because there was not so much business. The business is increasing every year, and more dirt attached to it; every time there are more engines put there there is more dirt; I remember when they only had a wooden trestle there and they only had one engine going there then.

30 Q. How long ago? A. Eighteen or 20 years ago.

Q. More than that?

A. I remember 20 years ago; I don't remember nothing back of that. I belong to that church since 1890, and I know what it was then and what it is now.

Q. Same old thing, except there are more engines?

A. More engines, more business, more dirt.

Q. But, except for the number of engines, the whole thing is just the same? A. Just the same thing.

Q. Now, let us go back to that question—you don't mean that 40 every time an engine passed within the past five years the dirt came in the window, do you? A. I certainly do mean it.

Q. Does this dirt sail against the wind?

A. I say it just depends upon which way the wind is blowing.

Q. Then if the wind is blowing in the other direction?

A. We are bound to get some anyway because the wind strikes the building.

Q. If the wind is blowing away from the windows then no dirt comes in?

A. You don't get so much but you will get some anyway.

Q. Then your answer is that when the wind is blowing dead away from the church some dirt comes against the windows from the engine into the church—that is your answer?

A. Yes, sir, when the wind blows against the church you get 10 more dirt, but the other way you don't get so much.

Q. Some goes against the wind anyway?

A. Yes, sir, some goes there just the same.

Q. How many suits of clothes did you buy last year?

A. I don't know; I buy one every time it gets dirty; throw it away.

Q. You don't know how many suits of clothes you bought?

A. Yes, four or five.

Q. You can remember that?

A. Yes, four or five suits I bought; don't exactly buy them for 20 the church every time only you know.

Q. What kind of suits were those?

A. I buy a suit of clothes for working and a suit of clothes for church.

Q. I am asking what kinds they are.

A. Some years I buy four, some two or three; some years I don't buy any.

Q. What kind of clothes are those you buy?

A. I generally get them made, \$18 or \$20.

Q. I am asking what kind of clothes they are? 30

A. Same as I got on now.

Q. All clothes look alike to you? *A.* No.

Q. Do you wear the same clothes working down in the sub-way that you wear when you go to church?

A. No, sir, I don't.

Q. You wear your best clothes when you got to church?

A. I certainly do, yes, sir.

Q. How many of those suits you bought were your best clothes and how many were your working clothes?

A. I bought two suits for Sunday this year. 40

Q. You bought two suits this year? *A.* Last year I mean.

Q. In 1910 you bought two suits? *A.* Yes, sir.

Q. Now, do you recollect how many suits of church clothes you bought during 1909?

A. I don't know just how many, couldn't say, probably one.

Q. I am asking you if you remember? A. No.

Q. Nor do you remember any other time in the last five years, do you? A. No, sir.

Q. Have you bought any best suits of clothes this year to go to church in? A. No, not yet.

Q. And you always have your Sunday suits made, do you?

10 A. Yes, sir.

Q. Made to order? A. Yes, sir.

Q. Who made them?

A. The fellow used to make them for me died; I don't know who is going to make them for me now.

Q. How many years did he make them?

A. The last ten years back.

Q. What was his name? A. His name was Talinsky.

Q. Where was he, what number was he at?

20 A. I don't know exactly what number, something I never bothered my head about; I knew where he lived, but I didn't look at the number of the house.

Q. You say he made you two good suits of clothes in the year 1910? A. Yes, sir.

Q. Same time? A. No, one before and one after.

Q. Are those the clothes you have on?

A. No, sir, I bought this last year; these clothes I wear to work in.

Q. What do you mean by saying that to kneel on the floors there in church eats up your clothes just as acid would do it, you didn't mean that?

30 A. There is something in that dust when you get down on your knees and kneel, you can't take it off with your handkerchief, you have to wash it off.

Q. Can you wash it off?

A. Sometimes you can, but it makes a spot like that (indicating).

Q. You never have had any clothes mended in the knees, have you? A. No.

Q. You don't mean then that it eats the clothing?

A. No, sir; it puts the clothes so it makes a big mark there.

40 Q. But it does not eat them like acid? A. No, sir.

HUBERT DE BALLIEL, called as a witness by the plaintiff, being duly sworn, on oath, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. What is your business?

A. I am reporter for the Polish newspaper and advertising manager.

Q. How long are you in that business? *A.* Five years.

Q. Where do you live? *A.* 253 Ogden Avenue, Jersey City Heights.

Q. Are you a member of the Roman Catholic Church of St. Anthony of Padua? *A.* Yes, sir.

Q. How long have you been a member of that church?

A. Since 1888.

Q. And during that time how frequently have you gone to church?

A. I generally go there every Sunday high mass, except sometimes it happens three or four Sundays in the year I miss the high mass.

Q. What services do you usually attend on Sunday?

A. High Mass, eleven o'clock.

20

Q. Do you attend any other services on Sunday?

A. Vespers, I generally go with my wife and children; that is half past seven in the evening.

Q. In the evening? *A.* Yes, sir.

Q. And about how long does that last? *A.* Two hours.

Q. And how frequently during this period that you have described have you attended vespers?

A. Vespers I attend about twice in the month on Sundays.

Q. And has that been your custom for a number of years?

A. No, not exactly; I remember now since about eleven years 30 I am steadier, I am getting old.

Q. You are familiar with the location of the church in connection with this railroad? *A.* Yes, sir.

Q. Describe it.

A. The church is located on Monmouth corner of Sixth Street and reaches with the school and buildings as far as Brunswick Street.

Q. You say it is on the corner of Sixth and Monmouth Streets? *A.* Yes, sir.

Q. On the immediate corner? *A.* Not exactly.

40

Q. What do you say it is on the corner for if it isn't?

A. On the corner is a saloon.

Q. And the church is not on the corner, the saloon is on the corner? *A.* Yes, sir, I made a mistake.

Q. Well, don't make mistakes, you will save time and trouble; have you observed the operation of the railroad on Sundays and on these occasions when you have attended services at the church? *A.* Yes, sir,

Q. I want you to describe now in detail what you have seen yourself in connection therewith?

A. The first thing I see is when I sit down on the bench **10** I spoil my new suit, full of black dirt and little splints like cinders; then the next thing when we are singing I get my throat full of dust it be choking me almost; we sing together sometimes; the next thing when the father was saying the gospel we could not hear him many times with the engines stopping and puffing.

Q. One thing at a time, you say when the engine is puffing—tell what noise you would hear?

A. The noise was enough so that you couldn't hear.

Q. What noise?

A. The cars bumping one against the other, the whistles blowing, the cars shifting from one track to another and one against another would be a terrible noise. **20**

Q. What of this puffing?

A. I can't explain whether it is steam or what; smoke comes up in big clouds, black clouds.

Q. What is the color of that smoke that you have seen?

A. It is dark, terrible dark, black.

Q. What quantities have you seen come out?

A. Terrible black smoke, a little like pebbles blown up; you could hear them dropping on the seats and against the windows. **30**

Q. How frequently have you noticed that?

A. I noticed that quite a long time, but lately, about five or six years, it is something fierce; I tell you the truth many times I feel like not going to church; that is a fact; it is true.

Q. Has it increased in extent or decreased?

A. It seems to me that it is increasing instead of decreasing.

Q. When you say increasing, do you mean the number of engines?

A. I think it must be more engines, because we get more smoke and dirt all the time.

40 *Q.* How frequently have you ever noticed the windows of the church open?

A. We have the windows open half way, perhaps; small panes come half way up, open on a string, pull them up and down; we

have to get a little fresh air, so many people in the church, especially for the children and women, they could faint; we got to have fresh air.

Q. Have you noticed where these particles come from such as you say you have noticed on the seats?

A. They come through the windows with the smoke, and they drop and settle.

Q. How frequently have you noticed this substance on the seats and chairs?

A. Every time I go to church I see it.

10

Q. Have you noticed it anywhere else except on the seats?

A. Yes; the last time we had our Bishop there, I was right up at the altar, where I had my seat; my eyes and my collar and my hands were all black, and the cover on the altar was dirty; I could write on it.

Q. What was the kind and character of the dirt on the altar?

A. Kind of brownish and it shines; shiny brown stuff.

Q. Outside of that one occasion, have you ever noticed these particles on any other portion of the church?

A. We have a flag, our flag was full of it; we have a Holy Name flag, and that was full of it.

Q. Inside the church?

A. Even the confessional was full of it; I kneel down with a light suit and my knees was all black.

Q. This noise which you say you have noticed from the railroad, what effect has it had on the ability to hear in the church as far as you personally have observed?

A. If you are right up in front you can distinguish what the father said, but a little further back you could strain yourself to hear a little, but you could not do it.

30

Q. Why?

A. The noise would stop it; this whistling and bumping of the cars and then stop right in front of the church and make more noise, the engines.

Q. How frequently have you noticed the engines stop?

A. Every time I go to church I see the engines there; in fact I pass there near every day and every time I just watch for purpose.

Q. How often have you noticed the engines stopping there?

A. Every time I pass there I see them stopping there.

40

Q. How often have you seen them stopping there, standing there?

A. Every time I pass, about twenty minutes.

- Q. How often have you noticed them stopping there?
 A. Always, every time; that is the only way I can explain; every time I am in the church and when I pass there.
- Q. What were they doing?
 A. Some of them shoving coal in, some of them backing up.
- Q. Have you ever noticed them standing still there?
 A. Yes, sir.
- Q. How often have you noticed them standing still there?
 A. About three or four times I remember.
- 10** Q. Three or four times in the last five or six years?
 A. I don't say that.
- Q. How often have you seen them standing there, can't you understand me?
 A. I pass the place pretty near every morning and I see them every day standing there.
- Q. You pass there every day?
 A. Yes, sir; that is my way.
- Q. For what length of time have you seen them standing there?
 A. I stopped once, I stood there and talked to a gentleman,
- 20** Q. I think he is in here; I noticed that the engine was there; I talked to him about half an hour and I noticed the engine was still there.
- Q. What was the engine doing during that time?
 A. A man was cleaning up, raking up the fire, and another fellow was shoving in coal.
- Q. What did you notice as to the smoke at that time?
 A. I see a great big cloud of smoke coming out.
- Q. That continued for how long?
 A. I don't know, I got out, I was choking.
- 30** Q. About how long did that continue while you were there?
 A. About half an hour.
- Q. You say you were accompanied by your wife and children to church? A. Yes, sir.
- Q. Have you noticed what effect this substance had upon the clothing of your wife and children? A. Yes, sir.
- Q. What?
 A. It ruined my wife's clothes; she had to go and have them cleaned.
- Q. How frequently have you noticed your wife and children's clothing?
40 A. Every time they go to church they get this done to the clothes.
- Q. Do they go to church with you every Sunday? A. Yes, sir.

Q. Have you ever been in the rectory or building used by the priest for his residence? *A.* Yes, sir.

Q. How frequently?

A. Once a week I take some reports for my paper, and the different holidays.

Q. And you have been going in there once a week for what length of time?

A. That is since I knew father; about 18 years.

Q. What have you noticed in the rectory as to these things?

A. I notice the walls is dirty, black. I take my pad out to write and I put my hand on his desk to write and I get my clothes full of that stuff.

Q. Do you refer to the same substance as you found in the church? *A.* Yes, sir. Get my hands all dirty.

Q. Can you describe what that substance is?

A. It is brownish dirt that is shiny like, just as if you would take isinglass and burn it up; I even make remark that the father did not keep it clean, and the housekeeper—

Q. Have you noticed this substance in any other portion of the rectory?

A. I was in the dining room when the bishop was there and I seen the same thing; of course, there was a clean table cloth; but the pastor had the window up and had to hurry up and shut the window, and it settled on the soup.

Q. What did you personally see at the time the window was open? *A.* I see the smoke blowing right in.

Q. Where was this smoke coming from that you saw blowing or coming in the window?

A. From the engine on the top of the trestle.

Q. How frequently have you seen that?

A. I was there that time.

Q. Did you ever see it more than this once?

A. Yes, very often since I have been there in the rectory, I have seen it about six times a month.

Q. For about how long? *A.* For about five years.

Q. Have you ever been in the school on the corner of Brunswick and Sixth street?

A. Yes, sir; I go there to visit the children.

Q. How frequently have you been in the school?

A. I wasn't this week, but last week.

Q. In the last six or seven years, how often?

A. Once a week, and that is on Friday.

Q. You usually go there on Friday? *A.* Yes, sir.

Q. And have been doing that for what length of time?

A. Five years.

Q. How long do you stay in the school when you visit there?

A. Three quarters of an hour or an hour.

Q. What have you observed in connection with this matter while in the school?

A. I see the same thing as I see in the church; I see the poor little children's dresses dusty and dirty; I see even the pads covered with dirt.

19 *Q.* The what?

A. The pads they write on; I was simply wondering how the poor little children can stand it.

Q. Have you ever noticed the windows of the school open?

A. Yes, and then the sisters would have to close them because of the smoke; I even scold the sisters that they ought to have them open.

Q. Did you personally see any smoke coming in the windows while there? *A.* Yes, sir.

Q. About how often?

20 *A.* Last Friday when I was there it was pretty fair, but the week before that it was full of it.

Q. About how often have you noticed the smoke come in the windows in the past five years?

A. In fact every time I go there I feel the smell of the smoke and sometimes I see more and sometimes less.

Q. How often have you actually seen it coming in the open windows—often? *A.* Quite often.

Q. What would you say was quite often?

A. What do you mean, I beg your pardon.

30 *Q.* How often or about how often have you observed the smoke from these engines coming in the open windows of the schools?

A. Every time I was there pretty near; that is, if the engines were standing on the trestle, I see the smoke coming in.

Q. About how often would you notice that?

A. About every second time I visit the school.

Q. Have you noticed the engines standing on the trestle for any length of time opposite the school?

A. They generally have the engine stand between the middle of the block, between Monmouth and Brunswick.

Q. Have you observed the kind or character of the coal which is in the tenders connected with the locomotives?

Mr. Wall—Objected to—

Q. I couldn't say; I don't know the first thing about it.

Q. Aside from the members of your family whose clothes you have seen soiled by coming in contact with this substance in the church, have you personally seen or observed the clothing of any other members of the congregation of the church affected in the same way? *A.* Yes, sir.

Q. About how many, how often or frequently?

A. Many times I look around and I see a lady put her hand for her handkerchief to rub it off, or I see a lady with a fine bow of ribbon on her hat, she touch it with her finger and there was 10 a big spot on it.

Q. These spots were what color? *A.* Brownish color.

CROSS-EXAMINATION, by Mr. WALL:

Q. Are you the editor of your paper? *A.* No, sir; reporter.

Q. Has your paper been very active in denouncing this smoke trouble? *A.* Very little; we did not do much writing about it.

Q. When did you begin to write about it?

A. A few years ago.

Q. When did you begin to write about it? 20

A. Two years ago, we give the people this advice—

Q. I am not asking what you wrote about it; I am asking when you first wrote or sent anything into your paper about this?

A. About two years ago.

Q. And how long had you been going to that church.

A. Since 1888.

Q. And it was your business to report everything in connection with that church? *A.* I am with the paper only five years.

Q. What did you do before that?

A. I was electro-finisher for the Star Electric Co., on Center 30 Street; and I was foreman for the Knickerbocker Press, in New Rochelle; then, my eyes got weak and I had education and I went with this paper and am still with it.

Q. Now, Mr. Karlosky has stated that the trouble now, as compared with the trouble in past years, was that there were simply more engines, more business, do you agree with that?

A. I agree with that.

Q. That is correct? *A.* Yes, sir.

Q. You are pretty close to the priest there?

A. No, sir; I am far away; I am on Ogden Ave., Jersey City 40 Heights.

Q. I mean your relations with the priest?

A. My relations are just simply business relations.

Q. Just simple business relations? A. That's all.

Q. Your paper didn't have anything to do with starting up this lawsuit? A. No, sir.

Q. You don't remember much trouble about this trouble with the smoke back of five years ago?

A. Yes, I went to a meeting one time; we had a meeting here in Jersey City, and of course, I wrote something about it, that is true, about the smoke; that it is terrible, ought to be a stop to it, the way it ruins the buildings, etc., in fact, the city was

10 all dirty; we wrote a few lines.

Q. I am not asking you what you wrote; you didn't talk about the smoke just from the railroad, it was soft coal smoke from everywhere, factories, railroads?

A. Yes, the soft coal business.

Q. The whole thing you were talking about? A. Yes, sir.

Q. And have you had any trouble with your throat at all?

A. No, sir.

Q. Your throat is sensitive, isn't it?

A. I guess my throat is pretty fair; I do a little smoking.

20 Q. I notice, as you sit here, you get hoarse, and every little while you have to clear your throat; you have a cigar, and you have the throat that we all have who smoke a good deal?

A. I smoke a good deal; I got to smoke.

Q. That is nothing against you?

A. No, sir; not a bit; I am healthy.

Q. Have you ever been in a cigar factory?

A. No, I have never been there.

Q. Never been in a factory? A. No.

30 Q. Don't you know that the atmosphere of a cigar factory is impregnated with dust? A. I don't know; never was there.

Q. As an educated man, don't you know it?

A. Well, I don't know, but to my knowledge that dust comes from tobacco don't hurt you.

Q. You know that the air in the places where cigars are made is impregnated with fine particles of tobacco?

A. Yes, that is true.

Q. You know, also, that the man who smokes a good many cigars draws the dust that is in the leaves back into his throat?

A. I beg your pardon for a minute—

40 Q. You know that? A. No, I blow it out.

Q. Oh, you generally blow it out? A. Yes, sir.

Q. But sometimes you forget, don't you, like the rest of us?

A. Nothing that goes against my health, you can watch me for hours.

Q. You never forget that? *A.* No, I blow it out.

Q. You don't experience any greater trouble than when you smoke a good deal more than usual, or when you smoke a little, the same thing? *A.* The same thing with me.

Q. You don't have any more trouble when you sit up till one o'clock in the morning, and smoke all evening as well as all day, you don't have any different feeling?

A. No, unless I drink some Wurtsburger.

Q. You can smoke 18 hours out of 24 and never have any feeling in your throat? *A.* Yes, you get a funny feeling, a funny 10 head.

Q. And that doesn't come from the dust?

A. The strain of the tobacco.

Q. I guess sometimes you forget to blow out those cigars?

A. Well, we all make a mistake some times.

Q. How do you know the flag was full of dirt?

A. Because we took it down for the parade, the Holy Name, and we shook it out and the dirt came all over us, our hands and face got full of dirt.

Q. Did you see that? *A.* Yes, sir.

20

Q. You saw the dirt fall out of the flag? *A.* Yes, sir.

Q. What made the dirt fall out of the flag?

A. When we took it out, the shaking of the flag.

Q. That flag had been shaking in the wind there?

A. No, sir, it don't blow in the wind; it hangs down like that, and there is no wind.

Q. This is a plumbline flag?

A. This is inside the church, the banner.

Q. Oh, I didn't understand; when did you spoil that new suit?

A. I spoiled a new suit—five days ago I spoiled a suit.

30

Q. When was the time you spoiled the other suit?

A. About six months ago.

Q. And the other suit?

A. You take a black suit, dark suit, don't notice it so much, but a light suit shows; I don't wear no more white vests to church, because after it is washed it gets some yellow color on it.

Q. I am not asking you that; you said in your answer in answer to Mr. Hardenbergh's question that you spoiled one new suit? *A.* I spoiled more than one new suit.

Q. A great many? *A.* You bet.

40

Q. How many?

A. I can spoil a suit in a day if I don't take care.

Q. I am asking you how many suits you spoiled in the last year?

A. As regards the church, I get a suit every two months generally.

Q. You do?

A. Yes, sir, and my tailor is Witte by Montgomery Street and the next one is on Seventh Street.

Q. How long have you done that?

A. I do that ever since I remember; I have to have a good appearance, because that is all you got in this world.

Q. That is your idea? A. Yes, sir.

Q. The tailor makes the man?

A. No, not exactly, but always a man supposed to dress according.

Q. Do you mean to say that in the last five years you have bought thirty suits of clothes?

A. For business and to go out, yes, about that.

Q. And you got those thirty suits of clothes from the same tailor? A. No, not the same.

20 Q. You said one, didn't you?

A. Yes, and I got a man in New York, he is on 125th Street.

Q. You don't mean to say—

A. I buy some of them ready made, I generally go to Hackett's.

Q. When did you buy that suit you have on?

A. A couple of weeks ago—I tell you, last Friday.

Q. Do you mean to state— A. This suit, last Friday.

Q. Do you mean to swear that you bought thirty suits of clothes in the last five years? A. I got to swear to it, yes.

30 Q. Well, if you swear to it, will it be true?

A. Certainly it will be true.

Q. How much do you pay for a suit of clothes?

A. I get a suit for \$18; get a suit for Sunday, \$24; that is the highest.

Q. How many suits of Sunday clothes have you bought?

A. I got about fifteen.

Q. You have fifteen now?

A. No, I give them to a second hand dealer when they get soiled; I let the people come in and get them; lots of clothes

40 I give to the Holy Name Society or charity; I don't keep clothes home.

JOHN GUTOVSKY, being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Where do you live? *A.* 279 Pavonia Avenue, Jersey City.

Q. What is your business? *A.* Machinist.

Q. How long have you been in the machinery business?

A. Thirteen years.

Q. Who are you connected with? *A.* Our own company.

Q. Where are they? *A.* 504 Grand St., New York.

Q. When you say you are in the machinery business, what do 10 you mean? *A.* Manufacturing printing presses.

Q. Are you a member of the Roman Catholic Church of St. Anthony of Padua? *A.* Yes, sir.

Q. And how long have you been a member of that church?

A. I have been a member of that church about fifteen years.

Q. And how frequently, in that time, have you gone to church; what is your custom?

A. I go there every Sunday and every holiday we have in the week.

Q. You refer to the church holidays? *A.* Yes, sir.

20

Q. And about how many church holidays are there in the year?

A. Well, the month of May and October, and the others, about seventy-five holidays during the year.

Q. 75 in the whole year? *A.* Those I attended.

Q. One every day in the month of May, and in October?

A. Yes, sir.

Q. And the others are scattered through the other months of the year? *A.* Yes, sir.

Q. What services do you attend in the morning, Sundays?

A. Two, the first mass and the high mass.

30

Q. What time? *A.* Half past eight and eleven.

Q. The half past eight extends how long?

A. A little after ten.

Q. And then you go to the high mass at eleven?

A. Yes, sir; I stay there till about half past twelve or one o'clock.

Q. Then you are in the church from about half past eight till one o'clock?

A. Yes, sir; from half past eight till one o'clock.

Q. That is your rule every Sunday? *A.* Every Sunday.

40

Q. And devote that many hours to church service?

A. Yes, sir.

Q. How about vespers in the evening? *A.* I go every Sunday.

Q. What time? *A.* Half past seven.

Q. And how long does the vespers continue?

A. From half past eight till nine o'clock.

Q. I thought you said you went at half past seven?

A. From half past seven to nine o'clock, I mean.

Q. What is the average number of services you attend on Sunday?

A. Every Sunday, and every holiday, as I said there is about 75 holidays.

10 *Q.* You go every Sunday? *A.* Yes, sir.

Q. And have for this length of time you have testified to?

A. Yes, sir.

Q. You know where the church is situated, do you, in connection with the railroad?

A. It is situated on Monmouth and Sixth Street.

Q. Why do you say that, do you mean immediately on the corner?

A. On the corner right by Sixth Street.

Q. Is it on the corner or not? *A.* It is—

20 *Q.* There is a saloon building on the corner—

A. There is a saloon on the corner, yes, next to the corner.

Q. Have you noticed the railroad on Sixth Street?

Mr. Wall—Objected to if designed to elicit the location of the railroad, as being incompetent, and this witness not qualified to testify.

A. Yes, sir.

Q. That railroad is on a trestle? *A.* Yes, sir.

Q. About how high is the trestle?

A. About thirty feet; thirty or thirty-five feet.

30 *Q.* The railroad is on top of that? *A.* Yes, sir.

Q. It is a stone trestle? *A.* Yes, sir.

Q. And that extends from Monmouth Street how far?

A. From Monmouth Street up to the street above Brunswick.

Q. Have you ever been in the rectory, the priests' residence?

A. Yes, sir.

Q. How frequently have you been there?

A. Generally go there four or five times a month.

Q. About how long do you stay each time?

A. Sometimes an hour, hour and a half, two hours.

40 *Q.* For about how many years have you been doing that?

A. About seven years.

Q. Ever been in the school on the corner? *A.* Yes, sir.

Q. How frequently you been in there? *A.* Once a month.

Q. For this number of years about once a month?

A. Not so much now; I have not been there for about four months now.

Q. Before that time you went more frequently?

A. About once a month.

Q. For how many years back? *A.* Six years.

Q. And how long would you stay in the school? About how long? *A.* About two hours.

Q. What have you noticed while in the church in connection with the operation of this railroad, make a detailed statement, see 10 if you can get at it without wasting a lot of time on questions.

A. Every time I go to Sunday Mass when the engine comes along there is a lot of smoke, and the steam exhausting while the sermon is going on you couldn't hear what the priests say, and the smoke comes right into the church when the wind is blowing south.

Q. Have you observed it coming through the open windows?

A. Yes, sir.

Q. How frequently?

A. Every time I go to Church, every Sunday.

Q. Every Sunday through the windows of the Church?

A. Yes, sir, every Sunday.

Q. And how frequently have you noticed it coming in through the windows of the Parish house?

A. Every time I go there I find a lot of dirt.

Q. I am asking you if it comes in through the windows.

A. Every time I am there.

Q. And through the school do you recall?

A. Every time I went there engines were coming along; I see the smoke coming through the windows also.

Q. When the windows would be open? *A.* Yes, sir.

Q. Describe in a general way what this smoke consists of—what it looks like?

A. It looks black, kind of shiny like, regular cinders.

Q. Have you noticed the quantity of this stuff?

A. Sometimes you could see the seats all covered up.

Q. I have asked what quantities you have seen coming in through these windows?

A. I see a whole lot come in through the windows.

Q. I ask what you see coming from the engines?

A. It is black specks.

Q. About what quantity—much or little?

A. A whole lot, a dark cloud.

Mr. Wall—Objected to as being suggestive and I ask that it be stricken out.

Q. Have you ever noticed the engines standing on this track opposite this school or the church rectory or the church itself for any length of time?

Mr. Wall—Objected to as irrelevant and immaterial; we have a perfect right under the charter of the company to stand on the track.

Q. Answer the question?

10 *A.* I notice engines standing on the track every time I go to church.

Q. For what length of time, I mean standing still?

A. Sometimes stand there for an hour or hour and a half.

Q. Have you noticed whether any smoke emitted from them while standing there?

A. Yes, sir; while they put the coal on, soft coal on.

Q. You say soft coal, have you observed the kind and character of coal which the firemen put in the engines? *A.* Yes, sir.

Q. Describe it?

20 Mr. Wall—Objected to; he is not qualified to testify as to the grade of coal or quality.

Q. When you say soft coal, will you describe the general appearance?

A. It is black coal and very soft—that is all I can explain.

Q. In your place of business, where you work, do they use coal there in the furnaces? *A.* Yes, sir.

Q. What kind of coal do they use there? *A.* Hard coal.

Mr. Wall—Objected to; immaterial what they use in New York City.

30 *Q.* You are familiar with the different kinds of coal, the difference between hard and soft coal?

Mr. Wall—Objected to as not qualified to testify as to the grades of coal.

Q. Do you know the difference between hard and soft coal?

A. Yes, sir.

Q. Describe the difference so far as you personally know?

A. Soft coal, all I can describe, soft coal is soft, breaks to pieces; hard coal is hard, hard, that is all I can describe.

40 *Q.* And which of these kinds of coal have you noticed and seen in the engines and put in the engines of this railroad? Which kind of coal?

A. I have seen soft coal put in the engines.

Q. What have you noticed in the church in reference to the operation of this railroad as to noise?

A. When I go to church on Sunday while the engines are standing there or passing, sometimes the father is saying the gospel, we can't hear anything, he has got to stop until the noise stops.

Q. What does that noise consist of?

A. Exhausting steam and smoke coming out of the chimney.

Q. Does the smoke make noise?

A. It is steam and smoke coming out, puffs, makes noise, and 10 the cars bumping and passing the switches.

Q. How frequently has that noise been so excessive or to such an extent as you have been unable to hear the father preaching or conduct the services?

A. Every Sunday I am there; Sundays and holidays; every time I am there I hear that noise.

Q. How frequently has it been so excessive as to interfere with your hearing distinctly what the father says?

A. for the last past six years.

Q. How frequently, every Sunday, or once every ten Sun- 20 days?

A. I said every Sunday, four or five times a month I go to church, and all the holidays.

Q. What have you noticed in the church in regard to this smoke which you say you see coming in the windows.

A. I see the smoke and dirt there on the seats and on the banners, all over the church, and also over the organ.

Q. Can you describe what that looks like?

A. Like cinders from the soft coal.

Q. Anything else there besides cinders that you noticed? 30

A. Black substance.

Q. What is it you have seen besides cinders in it?

A. I see black dust from the coal, soft coal.

Q. Black dust, does that dust there have any effect at all on your clothing? *A.* I spoiled a couple of suits.

Q. In what way?

A. By sitting in the seat—get up out of the seat they are all stained.

Q. Have you noticed anybody else's clothing in the church?

A. I see my wife's clothes the same way.

Q. Have you noticed anybody else's clothing in addition to your wife's?

A. I have seen people sitting in the seats, and their clothes all

stained when they get up; some lady wearing a white skirt, when she get up you can see the stain all over it.

Q. What conditions have you noticed in the rectory, the priests' residence, in connection with the smoke which you have seen coming in there—the same thing?

A. Exactly the same thing. Same thing as in the church.

Q. And how about the school, have you noticed it in there?

A. The same way.

Q. Notice the children's clothing?

10 *A.* I couldn't explain that; I didn't go there much to see the children.

Q. While you were in the rectory, did you notice the extent of the noise, whether it interfered with the conversation or not?

A. Yes, sir.

Q. And how frequently have you noticed the noise so excessive as to interfere with conversation, in the rectory?

A. About every time I was there.

Q. And that noise was the same noise you noticed in the church? *A.* Yes, sir.

20 *Q.* Same thing? *A.* Exactly the same.

Q. How about the school?

A. Exactly the same thing as in the church.

Q. Have you noticed anything else in the church which this smoke would affect there other than the accumulation of this substance on the seats and the organ as you spoke of?

A. Sometimes when you try to sing you can't sing from the dust comes down your throat; you get sick; many times I have been in the church and when I get home I feel sick from that smoke.

30 *Q.* Is there any particular smell from this smoke?

A. Yes, it is like the smell from soft coal smoke, that is all I can explain.

Q. Does that extend throughout the church, or just over—

A. Yes, sir; that smoke goes from one side of the church to the other; windows all over the church.

Q. And how is that in the rectory?

A. Same thing, exactly the same.

Q. And the school? *A.* All the same.

Q. In your business as a machinist, have you become familiar with the smell attached to the burning of soft coal? *A.* No, sir.

CROSS-EXAMINATION, by Mr. WALL:

Q. You don't mean to say that the smoke comes in through

the church windows when the wind is blowing dead away from the church?

A. Sometimes heavy pieces come against the church, no matter how heavy the wind blows, they come right against the church.

Q. You did mean to say it, did you? *A.* Yes, sir.

Q. And that has been so, that there never has been a Sunday, for how long, that the smoke has not come in the windows?

A. Every time I am there I see when the heavy smoke comes out of the engine it comes into the church.

Q. Just what you swear to is, that every Sunday you have been 10 in that church for the last five or six years—

A. I belong to that church for fifteen years.

Q. Then your testimony is that every Sunday for the last fifteen years that you have been in the church—and you have been in the church nearly every Sunday, that cinders have come in through the windows even when the wind was blowing directly against the cinders? *A.* Yes, sir.

Q. That is your testimony? *A.* Yes, sir.

Q. You understand the nature of an oath, don't you?

A. Yes, sir.

Q. You don't have any feeling that you are not under oath?

A. No, sir.

Q. Do you understand that the testimony you are giving—do you understand that what you tell us here is the same as if you had put your hand on the Catholic Bible and sworn it was true?

A. Yes, sir; I understand it; I am to tell everything true; it is true.

Q. And when Mr. Beach comes in here he is going to swear you? *A.* Yes, sir.

Q. Now, do you mean to say that you saw an engine stand 30 there for an hour and during that whole time send out a lot of smoke? *A.* Yes, sir.

Q. You mean to say that?

A. Sometime it stood for an hour and smoke came out of the engine.

Q. For a whole hour an engine stood still and for that whole hour smoke was coming out of the engine.

A. Smoke comes out of the engine, yes.

Q. Is it yes or no? *A.* Yes.

Q. Now then, you know that that coal burned there is worth 40 money, don't you? *A.* Yes.

Q. And if the engine is standing still and the coal smoke is coming out of it for a whole hour, you know that a lot of money

is being wasted for which nothing is being got by the railroad company? *A.* Yes, sir.

Q. And yet you say that the engine stands still for a whole hour, burns up coal and gets nothing out of it? *A.* Yes, sir.

Q. That is what you say? *A.* Yes, sir.

Q. And you say more than that—

A. I say he has got to keep burning the coal.

Q. You say more than that; you say as the smoke comes out of the engine the smoke makes a noise? *A.* I said steam.

10 *Q.* Did you say, didn't you say the smoke makes a noise?

A. I said smoke and steam.

Q. Didn't you say the smoke makes a noise as it comes out of the engine; did you say it or not?

A. I said so; yes, sir.

Q. Now, as a machinist, will you explain how smoke makes any noise coming out of the engine? *A.* Exhausting.

Q. Does the smoke exhaust?

A. No, the steam exhausts; the smoke, when it is coming out of the engine, it is puffing.

20 *Q.* Does the smoke make any noise?

A. The smoke, when it comes out of the engine—

Q. Do you say, as a machinist, that the smoke makes any noise when it comes out of the chimney of the engine? *A.* Yes, sir.

Q. The smoke makes a noise as it comes up?

A. I said the steam and the smoke make noise.

Q. You know the smoke doesn't make any noise, don't you?

A. The smoke makes noise while it is puffing; the steam is exhausting, the steam makes noise.

Q. Does the smoke make noise? (No answer.)

30 *Q.* Does the smoke make a noise?

A. When the engine starts up—

Q. Don't you understand my question, do you swear that it makes a noise for the smoke to come out of the engine, out of the chimney of the engine, do you swear that or not?

A. When the engine starting up, that is all I can swear, when it starts to move.

Q. You answer my question, does the smoke make a noise coming out of the chimney? *A.* Not when it is coming out itself.

40 *Q.* Why do you keep dodging me, why do you keep trying to get away from my question, why don't you tell the truth?

A. I am telling the truth; yes, sir, the steam is exhausting and it makes a noise.

Q. Does the smoke make the noise?

A. Not the smoke when it comes out itself.

Q. Now, take it up as to the cinders going against the wind, do you still say that the cinders go against the wind?

A. The heavy cinders, yes.

Q. Do you still say that you have ever seen the cinders from the engine come in through the windows of that church in quantities against the wind?

A. Yes, sir, right through in through the windows, I say that.

Q. You can say what you please, but is it true, why do you say 10 that? *A.* Yes, sir; I have seen that.

Q. Against the wind, right into the church? Why don't you tell the truth? *A.* I got to tell just what I seen.

Q. I ask you this question—have you seen the cinders come against the wind into the windows of that church?

A. I have seen them, yes sir.

Q. When did you see that? *A.* I couldn't explain.

Q. When did you ever see such a thing?

A. I see the wind blowing against the smoke, say we had a North wind, against the railroad, still the cinders come into the 20 window.

Q. That is what you say? *A.* Yes, sir.

Q. You say you have seen those cinders travel against the wind into the windows of the church? *A.* Heavy cinders.

Q. I am not asking you whether they are heavy or not—you have seen cinders from the railroad travel against the wind and come into the windows of the church, you swear that?

A. Yes, sir.

Q. You do? *A.* Yes, sir, I swear.

Q. The railroad is not up on a trestle at all, is it?

30

A. It is on the stone up at Brunswick Street.

Q. On a trestle or not, in front of the church? *A.* Yes, sir.

Q. What do you mean by a trestle? *A.* It is stone.

Q. Embankment? Solid, or can you see through it?

A. Solid.

Q. Well you know that is not a trestle, it's an embankment, isn't it? *A.* Yes, sir.

Q. And on top of that? *A.* Tracks, trestle.

Q. What do you mean by a trestle, tell us what you think a trestle is? *A.* A trestle is a railroad.

40

Q. Any railroad is a trestle?

A. No, railroad runs up in the air, it is a trestle.

Q. Whenever a railroad is up in the air you mean it is a trestle, is that right? *A.* Yes, that is what I mean.

Q. If an embankment is built of stone and the railroad is on top of it, you mean that the railroad is on a trestle?

A. Embankment.

Q. Do you mean that it is on a trestle or not?

A. Yes, that is what I mean, on a trestle.

Q. That is the kind of a trestle it is—it is a solid stone thing that the railroad is on? *A.* That is right.

10 *Q.* That right? *A.* Yes, sir.

Q. And the church is down on the street, isn't it?

A. Yes, sir, down on the street.

Q. About thirty feet below the tracks?

A. About thirty feet below the tracks.

Q. Guessing?

A. Yes, sir; it might be more than thirty feet.

Q. And the engines are quite a distance above the tracks, aren't they?

A. Yes, the engines quite a distance above the tracks.

20 *Q.* And the smoke comes out of the chimneys of the engines?

A. Yes, sir.

Q. Any other place?

A. No, sir; only when he opens the boiler or his fire.

Q. You say it comes out then? *A.* I guess—

Q. I don't want you to guess, does it or not?

A. I don't say anything.

Q. Now then, is the top of the engine, the smokestack of the engine higher than the windows of the church?

A. I think it is higher, yes, sir.

30 *Q.* It is higher? *A.* Yes, sir.

Q. So then you say the cinders go straight up in the air from the engine? *A.* They spread all over.

Q. They go straight up in the air? *A.* Yes, sir.

Q. And these cinders that travel against the wind are cinders that have been up in the air and are dropping? *A.* Yes, sir.

Q. But they drop and then come against the wind?

A. Yes, sir; I will explain that.

Q. I don't care for any explanation; now, these other witnesses said that this was a brown, shiny kind of stuff, you say it is a black cinder? *A.* It is black.

Q. You have not seen any of the brown? *A.* Black, shiny.

Q. Have you seen any of the brown shiny ones that they mentioned, yes or no? *A.* Yes, sir, I seen—

Q. Then there are two kinds?

A. There might be two kinds.

Q. Not there might be; have you seen two kinds?

A. Yes, sir, I have seen two kinds.

Q. I thought you said one kind, black.

A. I didn't say only one kind.

Q. Is there one kind or two? *A.* Two.

Q. Is it your idea that the brown kind comes from the railroad? *A.* Yes, sir.

Q. Why do you say that?

10

A. Because I see them come through the window while the engine is there.

Q. And you saw the black kind too? *A.* Yes, sir.

Q. There are two different kinds?

A. It looks something like black or brownish.

Q. Look here, are there two kinds or not, now take your time and answer the question.

A. It looks to me like there are two kinds, but I will say only one kind, brownish; I took it for black.

Q. Then there are no black; take your time and answer?

20

A. I will say brownish.

Q. You say there are no black?

A. I say I see so much of that stuff in there I can't explain just what they look like.

Q. Can't you tell us whether those cinders are black or brown, you can if you want to tell the truth?

A. I will give you black and brown.

Q. You say both then? *A.* Yes, sir.

Q. There are two kinds then?

A. There are two kinds which I see which I can explain.

30

Q. And you swear that you saw both kinds coming from the railroad? *A.* Yes, sir.

Q. What is the brown made of, what does it come from?

A. Come from the railroad, from the engine, the soft coal.

Q. How do you know it?

A. I see them come out of the engine.

Q. You saw those brown things coming out of the engine?

A. Yes, sir.

Q. How big are they? *A.* Little bits of things.

Q. How big are they, big as the head of a pin?

40

A. Some little bigger.

Q. Where were you when you saw them coming out of the engine? *A.* Sitting in the seat.

Q. In the church? A. Yes, sir.

Q. How far from the engine? A. I can't tell exactly.

Q. It is across the street? A. Yes, sir.

Q. How far is that?

A. I don't know just how wide the street is.

Q. About fifty feet? A. Yes, sir; fifty feet.

Q. And you can see coming out of the engine stack, you can see a piece of cinder as big as the head of a pin, sitting in the church, you swear to that? A. I swear that.

10 Q. And you can see whether it is brown or black?

A. I can't swear exactly whether it is brown or black.

Q. You swear that you did see that—why don't you tell us what is true? Now, you want to swear that you saw coming out of the chimney of a locomotive across the street, while you sat in the church, cinders which you recognized as brown cinders, that is right? A. That is right.

Q. You swear to that? A. Yes, sir.

Q. And other cinders which you recognized as black cinders?

A. Black, shiny.

20 Q. Any other kind? A. Some kind of light dust.

Q. White cinders? A. Yes, sir.

Q. Any other kind? A. That is all I know.

Q. How long have you been a member of the church?

A. I been a member of that church about fifteen years.

Q. How old are you? A. Thirty-one.

Q. And you have been going continuously to that church?

A. Yes, sir; I know six years I am there all the time; before I didn't go so much.

Q. Do you hold any office in the church? A. Yes, sir.

30 Q. What? A. Collector.

Q. Collector of what?

A. Money, collect the church benefits.

Q. What office does this newspaper man, de Balliel, hold?

A. He has an office on Washington street.

Q. Has he an office in the church?

A. No, not that I know of.

Q. Now, you don't know whether it is soft coal or very soft coal? A. I couldn't explain it.

Q. You didn't mean to say it was very soft coal?

40 Q. I couldn't say whether it was very soft coal; I know it was soft coal.

Q. You don't know anything about coal?

A. I know about soft coal and hard coal.

Q. I know, but you don't pretend to know anything about coal? *A.* It is soft coal.

Q. Are you educated on the coal subject or not? *A.* No.

Q. Now, some of these witnesses said that for the last twenty years there it was just the same, only now it was more so, more noise, more smoke; is that so for the 15 years you have noticed?

A. Yes, sir.

Q. You agree with that? *A.* Yes, sir.

Q. You do?

A. Yes, sir; only every year it is increasing, more business, 10 more engines on the trestle.

Q. What do you mean when you say you got sick from the smoke?

A. Sometimes when I go to church and we are singing—

Q. Did you ever get sick from the smoke?

A. I never got sick but I got sore throat.

Q. Well, what did you say you got sick for?

A. When I got home I would take drink of water and gargle and it would go away.

Q. Go away right away?

20

A. I do that every time I come from church.

Q. You did that? *A.* Yes, sir.

Q. Every time? *A.* Yes, sir.

Q. You swear to that, you swear that you gargled yesterday after you came home from church? *A.* I took a drink.

Q. Do you swear that you gargled your throat yesterday?

A. Yes, sir; I swear it; I take a drink of water and gargled every time; I always do that when I sit down to eat.

Q. Well, you didn't mean that you gargled yesterday on account of the smoke?

30

A. Not exactly account of the smoke; I won't say exactly on account of the smoke; I always gargle before I sit down to my meal.

Q. Tell us when you got sick from the smoke?

A. I say I never got sick from the smoke.

Q. Did you ever gargle for a sore throat from the smoke?

A. When I come home from the church before I sit to my meal, I always take a drink of water; I get kind of sore in my throat when I come from the church, but I cannot swear it is from the smoke or not.

40

Q. Never had a real sore throat?

A. No, never had a real sore throat so I couldn't go to work.

Q. How many suits of clothes did you buy during the year—you are not such a swell as Hubert de Balliel, are you?

A. Three or four suits a year; I buy a Sunday suit I wear on Sunday for a while, and when the suit gets damaged in the church I take it for every day.

Q. How many suits have you damaged in the church?

A. Three suits a year.

Q. Three suits a year?

A. Yes, sir; get them dirty in the church when you get down
10 in the seat, and then when you send them to get cleaned they spoil the suit.

RE-DIRECT, by Mr. HARDENBROOK:

Q. These windows in the church are the ordinary high church windows, aren't they? *A.* Regular high church windows.

Q. About how do those windows compare in height, the top of the windows, compare with the engines standing on this stone embankment?

A. You mean how high the engine and the top of the
20 windows?

Q. Yes. *A.* I should judge about four or five feet higher—the engine.

Q. The top of the engine?

A. Top of the engine; it might be more.

Q. As near as you can remember the top of the engine is about four or five feet higher than the top of the windows in the church? *A.* Yes, sir; but I am not quite sure.

Q. Now, explain what you mean when you say that these cinders, these particles, travel against the wind after leaving the
30 engine?

A. When they come out of the engine full force, they go up in the air and splash all over and right over the church and then right in the windows no matter how heavy the wind is; when they come out full force bound to some go in the church.

Q. Is that smoke thrown up in the air with considerable force, as far as you have been able to observe?

A. Yes, sir; sometimes.

Q. About how high above the top of the smokestack have you noticed the smoke thrown up? *A.* I couldn't say how high.

Q. About how high? *A.* 25 or 50 feet, sometimes.

Q. Now, I show you an envelope, I show you a substance contained in an envelope marked "Taken from attic space 2 by 6" and ask you if you will look at the substance contained in that

envelope; just pour a little in your hand if you like, and state how that compares with the substance which you have testified as having seen in the church?

Mr. Wall—Objected to as improper and incompetent, and not the way to introduce evidence concerning this sample and not binding on the defendant.

Q. Answer the question please.

A. The sample here is about the same as what I have seen in the church.

Q. In what portions of the church?

10

A. Around the windows and falling all over the seats.

Q. And how does it compare with the substance you have seen in the rectory?

Mr. Wall—Same objection, and further, it is not proper re-direct.

A. The same.

Q. How does it compare with the substance you have seen in the school?

Mr. Wall—Same objection.

A. The same.

20

Exhibit marked "Ex. 1 for Identification, J. H. C., June 26, 1911."

Q. I also show you substance contained in an envelope marked "from bedroom, June 20," and ask you if you will look at the substance contained in this envelope and state how that compares in appearance and character with the substance you have testified as having seen in the church and the school and the rectory?

Mr. Wall—Objected to on the same grounds as heretofore stated.

A. I could not understand.

30

Q. How does that compare with the substance which you have testified you have seen, does it appear to be the same?

A. That appears to be the same; I could not say exactly.

Q. It appears to be the same? *A.* Yes, sir.

CHESTER SCHODOLSKI, called as a witness on the part of the plaintiff, being duly sworn according to law, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Where do you live? *A.* 142 Pavonia Avenue, Jersey City. 40

Q. How long have you lived there? *A.* Eight years.

Q. Where do you work? *A.* Stanley Golliek Co.

Q. How long you worked there? *A.* About three months.

Q. Before that what did you do? A. Every thing I could get to do.

Q. Are you a member of the Roman Catholic Church of St. Anthony of Padua? A. Yes, sir.

Q. How long have you been a member of that church?

A. Since I came to America.

Q. Well, nobody knows how long that is—

A. About seventeen years.

Q. And during that time how frequently have you attended
10 church? A. Every Sunday.

Q. What service? A. Low mass, at half past seven.

Q. And that service continues for how long?

A. About an hour or hour and a quarter.

Q. Do you attend any other services on Sundays?

A. Evening vespers.

Q. What time? A. Half past seven.

Q. And how long does that service continue?

A. From half past seven to a quarter to nine.

Q. And it has been your custom to attend church every Sun-
20 day on those two occasions?

A. Yes, sir, I was altar boy there before that.

Q. You were altar boy, how long?

A. About eight or nine years.

Q. And what service was it your custom to attend other than
the morning service on Sunday and the vespers Sunday evening?

A. Every services, I had to attend to serve.

Q. You mean all the church holidays? A. Yes, sir.

Q. Which consist of about how many services a year?

Q. At the time I was going there I was there every day to
30 Mass; when it was May or October then we had vespers in the
evenings, then it was twice a day.

Q. And while you were an altar boy you attended every day?

A. Yes, sir.

Q. Every week day as well as Sunday?

A. Yes, three or four times.

Q. On Sundays three or four times? A. Yes, sir.

Q. How long a period of time did that cover?

A. Six or eight years.

Q. Every day? A. Yes, sir.

40 Q. Services every morning? A. Yes, sir; I attended the
school, too.

Q. You know the location of this railroad?

A. Yes, sir, I do.

Q. I want you to explain now in full detail what you have noticed in connection with the operation of that railroad?

A. I have noticed that it was very noisy.

Q. What does the noise consist of?

A. Whistling, puffing, bumping cars against cars, noises that you can hear on a railroad.

Q. And how frequently have you noticed that during these years? *A.* Very often; most every time I was there.

Q. And was that noise audible in the church—did you hear it in the church?

10

A. Yes, sir, sometimes we couldn't even hear the sermon, and the priest had to stop on account of too much noise.

Q. And this noise that you say interrupted the service or interrupted your hearing, was this noise coming from the railroad? *A.* From the railroad.

Q. Have you ever been in the rectory?

A. Yes, I have been there often.

Q. What have you noticed there in connection with this noise?

A. I noticed black—

20

Q. One thing at a time—I am asking about the noise?

A. Same as I did in the church.

Q. Have you been in the school?

A. Yes, sir, I have been in the school.

Q. How frequently did you go in the school?

A. We had our headquarters of the Polish club there in the school and I went there.

Q. What period of time did that cover, how long?

A. I don't remember exactly—since that school was built up.

Q. How long would you be in the school at a time?

Q. Sometimes from half past seven in the evening until ten or eleven o'clock. *A.* 30

Q. How frequently a week? *A.* Twice a week.

Q. That covered a period of years? *A.* Yes, sir.

Q. What did you notice in the school as to noise?

A. Same thing as in the church.

Q. Same as in the rectory? *A.* Yes, sir.

Q. Now, in connection with the operation of this railroad, what have you noticed in addition to the noise from the operation of the cars? *A.* I have noticed the smoke.

Q. Describe what you have seen in regard to the smoke, where does it come from, what amount, what kind is it? *A.* 40

A. Came from the railroad; from the engines.

Q. What is the color? *A.* Dark brown or black.

Q. How frequently have you seen it coming from the engines?

A. I have seen it very often, but I could not just state how often; sometimes I have seen it every time; I can see it sometimes, now, when I am passing, but I don't take notice how many times.

Q. How continuous has that been during those number of years? *A.* Right along.

Q. It has continued right along? *A.* Yes, sir.

Q. What have you noticed in connection with this smoke after 10 it has emitted from the smokestacks?

A. I know if the windows are open the smoke comes right in.

Q. Into the church?

A. Into the church, or into the school or into the rectory.

Q. You have noticed it coming into the windows of all three from the railroad.

A. From the railroad, yes; if the trains are passing.

Q. How frequently have you noticed it? *A.* How often?

Q. About how often; fair average?

A. I noticed that about three or four times a week.

Q. During this entire number of years? *A.* Yes, sir.

Q. What effect have you noticed it had on the articles in the different edifices?

A. I noticed they were covered up with black-brown-like pieces; some of them were very soft when you press them; some of them were kind of hard.

Q. Take, for instance, the church, where have you seen this accumulation of particles?

A. Many times on the top of the altar, or on the seats and on the organ.

Q. Have you noticed what effect it had upon the clothing, your clothing, when it came in contact with it?

A. Not in my clothing much, because I wear black clothing; but my wife, when she goes to church, or the little boy dressed up in white clothing, you can notice that on them; I don't know just what it is but there is some black spots like grease in it.

Q. Have you noticed that in connection with any of the members of the church? *A.* No, I observed my wife and my mother.

Q. But not the other members of the congregation?

A. No, sir.

Q. How is it in the rectory, what have you noticed there?

A. I noticed the same thing as in the church.

Q. Where would the accumulation be in the rectory?

A. In the office, on the desk; that is the place I noticed it.

Q. How about the rugs, carpets? A. I didn't notice that.

Q. How about in the school?

A. In the school I noticed it quite often.

Q. Whereabouts?

A. In the hall, on the stage in our meeting-room and in the classes.

Q. And did you notice what effect it had on the clothing of the children and teachers?

A. Yes sir; you could notice it; because some of the tables are covered with white tablecloth, you could notice any dust 10 comes on it.

Q. Did you notice what effect this noise had upon your ability to be heard or ability to understand?

A. Had to stop at that time if there was any trains coming.

Q. That is true of the school?

A. In the school or in the church, whenever we had anything.

Q. In the rectory also? A. I didn't notice that.

Q. You never noticed particularly in the rectory? A. No, sir.

Q. I show you a substance which has been marked Ex. 2, for Identification, and ask you to look at the substance contained in 20 this envelope and state how the substance contained in this envelope compares with the substance you have testified you have seen coming from the railroad?

Mr. Wall—Objected to on the same grounds that were given before when the sample was produced to the previous witness.

A. That is the same.

Q. I also show you substance contained in envelope marked Plaintiff's Ex. 1 for Identification, and I ask you to look at that and state how that compares in character with the substance you 30 have testified you have seen as coming from the railroad?

Mr. Wall—Same objection as before.

A. That is the same, something like it.

Q. What is your answer?

A. It is the same as this; sometimes it was in larger lumps, larger pieces; this is finer.

CROSS-EXAMINATION, by Mr. WALL:

Q. How old are you? A. 26, going on 27.

Q. And you have been going to the church regularly for how 40 long? A. About 16 or 17 years.

Q. Your idea is that it is the smoke that is sometimes brown?

A. It is brownish, dark.

Q. But the cinders are always black? *A.* Sometimes black.

Q. You are not an expert on cinders?

A. Of course, I am not an expert on cinders.

Q. You never saw any brown cinders? *A.* No, I didn't.

Q. And you never saw any cinders sailing against the wind?

A. No, I didn't notice that.

Q. That takes a nautical man, don't it, to figure this out and stack these cinders up against the breeze? *A.* I suppose so.

Q. Your wife's dress, did that dust show around the edge of
10 the dress at the bottom? *A.* Yes, and where she sat.

Adjourned to June 29th, 1911, 10 o'clock.

Circuit Court of the United States, District of New Jersey.

ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA,
20 *Complainant,*
 vs.
THE PENNSYLVANIA RAILROAD
COMPANY,
 Defendant.

Testimony taken in the above-entitled matter at hearing before
Hon. George R. Beach, Examiner, at his office, 75 Mont-
gomery Street, Jersey City, June 29th, 1911, at ten o'clock
A. M.

30

Appearances—F. M. HARDENBROOK, Esq., of counsel for com-
plainant; ALBERT C. WALL, Esq., of counsel for The Pennsyl-
vania Railroad Company, defendant.

Mr. Wall—It is hereby stipulated on behalf of
the parties hereto that the coals used by the defend-
ant on the railroad in question, to wit—the Greenberg,
Avondale and Lloyd Ell coal, are each good grades of
bituminous coal.

40

Mr. Hardenbrook—I want to withdraw from the
record Exhibit C 2, for the reason that it does not
describe any of the property mentioned in the com-
plaint herein.

ANTHONY MACIEJEWSKI, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Where do you live? *A.* 181 Twelfth Street.

Q. How long have you lived there? *A.* Only two years.

Q. What is your business? *A.* Wholesale grocer.

Q. Where? *A.* Twelfth Street.

Q. New York City? *A.* No, Jersey City.

Q. How long have you been engaged in that business?

A. I am two years in this business; and before I was butcher and grocer; 11 years in the business; I was before butcher and grocer, and now is wholesale.

Q. All that time in Jersey City? *A.* Yes, sir.

Q. Are you a member of the Roman Catholic Church of St. Anthony of Padua? *A.* Yes, sir.

Q. And how long have you been a member of that church?

A. Since going on twenty years.

Q. How frequently do you attend church?

A. What does that mean?

Q. How often do you go to church?

A. I go to church every Sunday and sometimes two or three days in the week?

Q. You go to church every Sunday?

A. Every Sunday, and two or three times a week when the service comes in the church.

Q. That has been your custom for how many years past; your habit, for about how long?

A. Since I belonged to that same parish.

Q. What services do you usually attend on Sunday?

A. I am the treasurer—

Q. Answer my question, what services do you usually attend on Sundays? *A.* The service at high mass.

Q. How many high masses are there?

A. One low mass, nine o'clock in the morning and one high mass. Vespers in the evening. There is one now at eight o'clock just started up six months ago.

Q. Which one do you attend?

A. I am in the high mass and vespers.

Q. High mass at nine o'clock? *A.* No, eleven o'clock.

Q. And vespers at what time? *A.* Half past seven.

Q. How long does the morning service last?

A. Over two hours.

Q. And how long does vespers last?

Q. Over two hours; pretty near two hours; the high mass is over two hours.

Q. Have you ever observed the railroad running along Sixth Street between Brunswick and Monmouth Street? *A.* Yes, sir.

Q. Have you ever seen engines or locomotives on that branch, that piece of the railroad? *A.* Yes, sir.

Q. How frequently have you seen engines standing on the track there? *A.* Mostly all the time.

Q. Every time you have been up there?

A. I say pretty near every time.

10 *Q.* What have you observed in connection with those engines, what have you seen in regard to them?

A. There is a lot of smoke from the soft coal, and the whistles and the noise, and you can't open a window.

Q. I didn't ask you anything about the windows; what did you see in connection with the engines?

A. Smoke and noise; coupling cars.

Q. This smoke which you have testified you have seen, describe it, the kind, the color of it and the extent of it?

A. It is from soft coal, heavy smoke.

20 *Q.* I asked you the color of it? *A.* The color of it?

Q. Yes? *A.* Black color; the color is just black color.

Q. To what extent have you seen it, what quantities of it coming from these engines?

A. A big quantity; of course, if the engine comes under full power the smoke comes out very heavy.

Q. Is that true of every time you have seen engines on the track?

A. I see it pretty near all the time; lots of engines passing all the time.

30 *Q.* Now, what, in addition to the smoke you have testified to, have you noticed in connection with those engines or with the trains, what else besides the smoke?

A. Besides the smoke? Coupling cars, makes a lot of noise, and the switches, running over the switches you know.

Q. What noise does it make?

A. A lot of noise, coupling, bumping of the cars; lot of cars in there.

Q. The cars coming together? *A.* Yes.

Q. Is that noise very loud? *A.* Oh, terrible.

40 *Q.* Now, what else in addition to that have you noticed in regard to the operation of that railroad, in addition to the smoke,

and the noise from the coupling of cars, have you noticed anything else in the way of noise? *A.* Damage from the smoke.

Q. Can't you understand my question? If you can't, say so, and I will repeat it and keep at it until you do understand. What else have you noticed in the way of noise other than you have described. You say you have noticed noise from the bumping of the cars—have you noticed any other noise in addition to that?

A. From the whistles.

Q. Whistling of the engine? *A.* From the engines.

Q. How frequently have you noticed noises from the whistling of the engines?

A. Any time they start to run they give the whistles, the conductors.

Q. What else have you noticed, if anything, in addition to the noise from the whistling and the noise from the coupling of the cars, have you noticed any other noise? *A.* No other.

Q. Now, when you have been in the church, have you noticed any of this smoke such as you have described coming into the church? *A.* Yes, sir.

Q. How frequently have you noticed smoke such as you have described coming into the church, how often?

A. During the two hours of the High Mass that happens sometimes three or four times.

Q. During the two hours? *A.* Yes.

Q. Is that true of every Sunday? *A.* Every Sunday.

Q. And is it also true as to the time when the vesper service is being conducted? *A.* Pretty near the same.

Q. To what extent, if you can describe it, characterize it, have you noticed this smoke coming into the windows of the church, how much of it?

A. If you open up the windows then nobody can stay in the church, but sometimes if one or two windows open then of course it don't come so much; but it spoils the clothes and everything; you couldn't stay in the church—

Q. Did you understand my question? I ask you about how much, if you can describe it, in quantity, comes.

A. All I can understand how much, a pail or so, or gallons.

Q. Is it very much?

A. I can say bushels, how does that mean; I don't understand how much can come in; I didn't measure it; that not a question; I can't tell you how much, bushels.

Q. Have you noticed what effect this smoke, such as you have

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testified you saw coming into the church, has had upon the articles of furniture, and the decorations and things in the church?

A. Yes, sir.

Q. Describe if you can, as best you can, what effect this smoke, such as you have seen, has had upon the different things in the church? *A.* Yes, sir.

Q. Describe it, tell what effect it has in the church?

A. All spoiled, clothes spoiled; decorations spoiled; everything on the altar and everything that is in it.

Q. Whereabouts in the church?

10 *A.* The dust and smoke all over.

Q. Does this smoke, such as you have testified as having seen come into the church, carry with it any particles?

A. Yes, of course, they are full of dust.

Q. Can you describe the kind and character of that dust, what kind of dust is it?

A. It is like black sand, black sand or gravel, soft coal.

Q. Whereabouts in the church have you seen this substance?

A. In the seats.

Q. On the seats—anywhere else?

20 *A.* I don't go around you know, but any time I go to church I see the seats full of that dirt.

Q. Any other part of the church except the seats?

A. I never go around, I never can say that.

Q. I ask you if you ever saw it anywhere else?

A. I never seen it.

Q. You never saw it on the organ?

A. Yes, sir, I was sometimes singing in the choir and I saw lots of it.

30 *Q.* Have you seen it anywhere else except on the organ and on the seats? *A.* No.

Q. Have you noticed what effect this substance which you say you saw upon the seats has had upon the clothing—

A. Yes, sir.

Q. Of people with whom it has come in contact, what effect has it had on the clothing of these people?

A. If any comes with white clothes on then of course there is a lot of dust on it.

Q. What does it do to the clothing? *A.* Spoils it.

Q. Stain it? *A.* Certainly; of course it spoils the clothing.

40 *Q.* In what way does it spoil it, does it stain it black. How does it spoil it, in what way?

A. Have to get washed every time you come out of the church.

Q. Have you ever noticed what effect it had on your clothing?

A. The clothing I wear I don't pay attention much on it.

Q. Have you got a family, you go to church with your wife and children? *A.* Yes, sir.

Q. Have you ever noticed what effect it had on their clothing?

A. That is the only way I can say; all the time comes dirty from the church.

Q. And have you ever noticed what effect it had on the clothing of other members of the congregation?

A. I didn't take that attention.

10

Q. This noise such as you have described, which you have testified as having heard from the operation of these trains, have you ever heard that noise while in the church? *A.* Yes, sir.

Q. To what extent, if any, has that noise been audible, how can it be heard in the church?

A. Well, when the priest starts to speak he have to stop sometimes five or ten minutes before the noise gets stopped.

Q. How often have you noticed that within the past six years, about how often?

A. I tell you sometimes once; I can swear once every time on 20 the speeching, and sometimes two or three times; once all the time during the half hour or so, bumping, couplings, comes all the time.

Q. Once every time—you refer to once during each service?

A. Yes, sir; that is what I mean.

Q. I show you a substance contained in an envelope marked "Taken from the sills of the windows in four days" and ask if you will kindly look at the substance contained in this envelope and state how it compares in character and appearance with the substance which you say you have observed at various times in 30 the church?

Mr. Wall—Objected to on the ground that the question is incompetent; that the substance shown the witness is not so identified as to have any relation whatsoever to the issues in the case, and on the further ground that the question is irrelevant.

Q. Answer the question now.

A. I can prove that very easy because I got some of that from my own property; I can say that comes out of the engine; that comes out of the smokestack; I know that because I seen it a 40 good many times in the church.

Q. Answer my question; how does that compare in appearance with the substance which you have testified you saw on the seats and on the remainder of the church?

A. The same thing comes out of it.

Q. How does that compare with the substance which you have testified you have seen in the church?

A. Then I don't understand.

Q. Does the substance which you have seen in the seats and on the organ look the same as this?

A. Not so heavy as this, but pretty near the same; this is just from outside of the windows.

Q. How do you know where that is from; I didn't ask you
10 where it is from?

A. Not so heavy as this, but pretty near the same; black dust.

Marked "Ex. C 3, for Identification, J. H. C., June
29, 1911."

CROSS-EXAMINATION, by Mr. WALL:

Q. How long have you been going to that church?

A. Going on twenty years.

Q. Little over twenty years?

A. No, pretty near twenty years; it will be twenty years next
20 New Years.

Q. Smoke and noise and all the rest of it just the same since
you can remember?

A. Yes, sir; pretty near; of course there was not so many
cars in the last fifteen years, but now it is getting worse all the
time; company getting rich and more cars on the line.

Q. What? *A.* Company getting rich; more engines.

Q. You are treasurer of this church? *A.* Yes, sir.

Q. Church been growing all these years?

A. Well, population grow.

Q. You been getting rich? *A.* I also?

Q. Yes, you been getting rich? *A.* Yes, sir.

Q. You say that vespers last two hours?

A. Sometimes longer than that; vespers longer than two hours.

Q. They don't generally last two hours?

A. Every Sunday they last two hours.

Q. You say vespers last two hours every Sunday?

A. Pretty near two hours.

Q. Can you tell us what the truth is about it?

A. I can't tell exactly the hour; sometimes less, sometimes
more; that goes by the speeching; if a good priest comes speech-
ing he takes up an hour for speeching only.

Q. Now, you say the smoke came in three or four times during
every high mass on every Sunday for twenty years?

A. Yes, sir; if there was any windows up, you are full of smoke all the time; they try to keep the windows closed, but have to have air and sometimes the windows open.

Q. And it doesn't make any difference how the wind blows, if the windows are open the smoke comes in, that right?

A. Of course, pretty near all the time.

Q. Can't you say no if it don't; you understand the meaning of no? *A.* Yes, sir.

Q. Don't you understand the meaning of no?

A. I understand, but just let me tell you; if the wind from this side (indicating) how can the smoke come into the church? 10

Q. The smoke can't come against the wind, can it? *A.* No, sir.

Q. Nor can dust go against the wind? *A.* That is it.

Q. Now, when you said that you saw bushels of the smoke come in through the window, did you mean bushels of smoke?

A. I just only fooling; I didn't measure that smoke.

Q. Oh, you were only fooling?

A. Yes, sir; I didn't measure the smoke how much it come in; if you tell me how then I can answer.

Q. Now, you said that you saw dust from this railroad, or this sandy stuff on the seats, but you didn't see it anywhere else, 20 and then you said that you saw it on the organ?

A. Well, I forget; last ten or twelve years I was a singer in the choir; then I was there; but I see less of that; last ten years I was not upstairs at all.

Q. So the dust that you saw on the organ you saw it ten years ago, that right? *A.* More than that.

Q. More than that? *A.* Yes, sir.

Q. How much more than that? *A.* When I was a singer.

Q. How long ago was that? *A.* Fifteen years.

Q. Fifteen years ago? *A.* Fifteen years. 30

Q. Since then the only soot, or sand or cinders, or whatever they are you have seen have been on the seats, that right?

A. Yes, sir.

Q. That stuff that you saw, that the lawyer handed you, how much heavier is that than the stuff you saw in the church?

A. The dust is not so heavy, what we find on the seats not as heavy as this.

Q. This is much heavier than on the seats?

A. Yes, much heavier than on the seats.

Q. You never saw in the church any stuff as heavy as that that 40 the lawyer handed you? *A.* No, not heavy as that.

JOSEPH MENDRES, called as witness by the plaintiff, being first duly sworn according to law, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Where do you live? *A.* 218 Sixth Street.

Q. Jersey City? *A.* Yes, sir.

Q. What is your business? *A.* Ivory cutter.

Q. How long have you been in the business of an ivory cutter?

A. Eighteen years.

Q. Where? *A.* New York.

10 *Q.* New York City? *A.* Yes.

Q. Are you a member of the congregation of the Roman Catholic Church of St. Anthony of Padua? *A.* Yes, sir.

Q. How long have you been a member of that church?

A. Since 1887.

Q. How frequently do you attend service there?

A. Most every Sunday.

Q. And what service do you attend on Sunday usually?

A. Generally half past nine or half past ten.

Q. Either one or the other? *A.* Yes, sir.

20 *Q.* And you attend the evening service? *A.* Very seldom.

Q. About how long does this service in the morning continue?

A. About two hours.

Q. Have you observed the location and operation of the railroad on Sixth Street between Monmouth Street and Brunswick Streets, Jersey City? *A.* Yes, sir.

Mr. Wall—Objected to as containing a false assumption of fact; counsel has repeatedly referred to the railroad as being on Sixth Street; whereas there is no warrant in the proof as heretofore shown or so far adduced, or anything stated in the papers or the issues to uphold such assumption.

30 *Q.* What is your answer to the question—have you observed the operation of the railroad on this street? *A.* Yes, sir.

Q. State in a general way what you have observed in connection with the operation of the railroad there; take one element at a time; what have you observed there in connection with it; have you ever observed engines standing on the tracks there between Monmouth and Brunswick? *A.* Yes, sir; very often.

Q. What have you noticed in connection with those engines?

40 *A.* They got the switches right there between Monmouth and Brunswick; coupling cars and bumping; engines stand there and puff that smoke sometimes for half an hour steady.

Q. And is there any noise attached to this?

A. Yes, they let the steam out; I don't understand how it is; there is a white dust comes out with that steam.

Q. My question was, with the puffing of these engines is there much noise created? *A.* Yes, sir.

Q. You spoke of steam?

A. Sometimes they let the steam out, and white stuff comes out with it.

Q. Is there much noise attached to the coming out of the steam? *A.* That is worse than the puffing.

Q. You mean by that that the noise is greater?

A. That only lasts for a while though.

Q. I didn't ask you how long it lasted, I asked you if the noise so created by the letting out of the steam as you call it, is greater than the puffing of the smoke? *A.* Yes, sir, more noise.

Q. What other elements of noise have you noticed, if any, in addition to the puffing of the smoke and the letting out of the steam and the bumping of the cars?

A. The most noise is when there is a big train coming and there are two or three engines attached to it; it is impossible to hear anything then; that is the biggest noise of anything. 20

Q. And that noise so far as you are able to describe, or observe rather, is caused by what?

A. The puffing of the engines when they got a big train there.

Q. And is there any noise attached to the passing of these trains over the switches? *A.* Yes, sir; most—

Q. Is there any noise attached to the passing of these trains over the switches so far as you personally are able to observe?

A. About the switches, all I know is that they whistle every time they start up.

Q. And is there any noise attached to the passing of these 30 cars over the switches?

Mr. Wall—I object; you have already asked that, and in spite of the suggestiveness of the question the witness has answered that he noticed nothing but the whistling; I object to any further questioning along that line.

Q. What quantity, if you can describe it, of smoke have you seen coming from these engines, much or little?

A. I seen a good deal of it.

Q. Can you describe it in quantity?

A. Yes, sir; when you step on it you can hear it under your feet.

Q. Can you describe the quantity, is it very much? *A.* Yes.

Q. About how high in the air have you seen it go?

A. The smoke?

Q. Yes, we are talking about the smoke?

A. I couldn't tell you how high it goes.

Q. Can you tell about how high—three feet or thirty feet?

A. More than that sometimes.

Q. More than what? A. More than thirty feet.

Q. More than thirty feet? A. Certainly.

Q. How much more? A. I couldn't tell you.

10 Q. Can you give any estimation or idea as to about how high you have seen the smoke go?

A. My idea is that when it is stronger it goes up higher.

Q. What is the highest you have seen the smoke go so far as you can intelligently state? A. About 150 feet.

Q. Is there any difference in height when the atmosphere is heavy and damp from when the atmosphere is light?

A. On rainy days it is down.

Q. What is the color of this smoke which you have seen emitted from these engines? A. Black.

20 Q. This steam which you say you have seen coming from the engines, is there much of that or little?

A. That only lasts for awhile.

Q. Is there much or little of it? A. Good deal of it.

Q. Have you ever noticed any of this smoke, such as you have described, coming into the church?

A. Yes, sir; sometimes they got to close the windows on that side.

Q. You have noticed this smoke coming into the church?

A. Yes, very often.

30 Q. How often have you noticed this?

A. It comes in—on a clear day it don't come in so much, but on a rainy day it comes in awful; they got to close the windows.

Q. About how often, could you give any fair estimate about how often you have noticed that?

A. It comes in on every Sunday, but not as much—

Q. Some Sundays more than others?

A. On rainy days that is the worst.

Q. This steam which you say you have seen let off from the engines have you ever noticed any of that coming into the church?

40 Q. A. Yes, it is white cinders from that.

Q. Have you ever noticed any substance in this smoke which comes into the church? A. Yes.

Q. What? A. Soot,

Q. What is the general character of that dust—what is the color of it? *A.* Kind of black.

Q. Are the particles large or small?

A. Mixed; sometimes heavy and sometimes not, according to how strong the wind is.

Q. Have you noticed much of it coming into the church?

A. Yes, especially on rainy days, it comes in heavy.

Q. Whereabouts in the church have you seen these particles?

A. On the benches.

Q. On the seats where the people sit? *A.* Yes, sir. 10

Q. And where else, anywhere else?

A. I don't go anywhere else.

Q. That is the only place you have noticed it? *A.* Yes, sir.

Q. Have you noticed what effect it had on the clothing?

A. Yes, sir; lots of ladies make complaint because of their white dresses, and when they come out they were black.

Q. Have you ever noticed whether it had any effect on your clothing?

A. I didn't take notice of my clothing; I brush the soot off before I sit down. 20

Q. You have a wife a member of the congregation, and children? *A.* Yes.

Q. Have you ever noticed the effect on their clothing?

A. Yes.

Q. What?

A. I take the boy with me, and he has a white suit, and I clean the bench off, but when he gets through it is all black.

Q. About how long a period of time have you noticed these particles in the church, for how long a time back?

A. I cannot say; about three years ago it was not so much; it was pretty fair, but now since they started to burn that soft coal; I think it is something over three years; ever since that strike. 30

Q. Ever since the coal strike of some few years ago?

A. Yes, sir.

Q. Since that time it has been worse than before? *A.* Yes.

Q. Have you ever heard these noises which you have described, in the church while you have been attending service there?

A. Yes, sir; sometimes Father had to stop the sermon till it went past.

Q. How frequently have you observed these noises in the church? *A.* Every Sunday. 40

Q. And to such an extent that the Father would have to stop the service temporarily, how frequently?

A. Very seldom on Sunday that he don't have to stop.

Q. And by that you mean that it is almost every Sunday?

A. Not quite, sometimes he goes on with it, but you can't hear it.

Q. When he attempts to go ahead, with the noise existing, you can't hear? *A.* No.

Q. And sometimes he stops? *A.* Yes.

Q. How long has that continued, about how many years, if it has continued for any particular length of time—how long have 10 you noticed that?

A. That is more than three years ago.

Q. More than three years?

A. Yes, there was not so much noise when the wooden trestle was, but now—I remember when the wooden trestle was there was only one track then.

Q. And the road now runs on a stone embankment? *A.* Yes.

Q. When was that put there if you can remember; about when if you don't know exactly? *A.* I didn't take notice.

Q. But at the time the wooden trestle was there, how many 20 tracks were there? *A.* I remember only one.

Q. Now, are there more tracks on the stone embankment?

A. Yes, there are about four or five tracks.

Q. Do you remember or can you give any idea as to when these switches were put in? *A.* I couldn't tell you that.

Q. About how long have they been there?

Mr. Wall—I object; he has answered it.

Q. Have you ever been in the rectory? *A.* Yes.

Q. The residence of the Father connected with the church?

A. Yes.

Q. How often? *A.* Not very often.

Q. Well, how often? *A.* Once in a while.

Q. Have you ever noticed any of this substance such as you have testified you saw in the church, in the rectory?

A. I was no further than the hall, that is all.

Q. Have you ever seen this substance such as you have testified there? *A.* Yes, I have seen it.

Q. Have you ever been in the school on the corner of Brunswick and Sixth Street? *A.* Yes.

Q. How frequently have you been in there?

Q. I have been in there often; the last year not often, but before I used to go often.

Q. About how often did you go before that?

A. Once a week or two weeks.

Q. Have you children attending that school? A. No, sir.

Q. What duties called you there?

A. I used to go to meetings there.

Q. Have you ever noticed any of this substance such as you have testified having seen on the seats of the church in the school? A. Yes.

Q. Whereabouts? A. Mostly in the seats and on the windows.

Q. When you say seats you refer to the children's seats?

A. Yes, sir.

Q. Have you ever observed these noises which you have described while in the rectory? 10

A. I wasn't in there long, only a couple of minutes.

Q. Have you ever heard any of these noises such as you have described when you have been in the school? A. Oh, yes.

Q. How frequently have you observed these noises in the school? A. It was evenings, not as much as in the day.

Q. Were the school exercises going on at the time you were there? A. No, sir.

Q. They were not? A. No, sir.

Q. To what extent did those noises which you heard while in the school house interfere with the conversation so far as you personally know? 20

A. Well, if there was too much noise have to stop for awhile the meeting; course I didn't see any harm in that.

CROSS-EXAMINATION, by Mr. WALL:

Q. How old are you? A. Thirty-five.

Q. Thirty-five, and you have been a member, then, for twenty-four years? A. Twenty-four years.

Q. Has there been a church located there for twenty-four 30 years? A. A wooden church.

Q. Not the same church you have now? A. No, sir.

Q. Was there any noise there twenty-four years ago?

A. There was only one track.

Q. Was there any noise there?

A. There was noise there when the engine was passing.

Q. Did the coal make any cinders in those days?

A. Not as much as now.

Q. I didn't ask you that? A. Yes, it did.

Q. In other words, the situation to-day is the same as it was, 40 then, except there are more trains and more noise?

A. I think out of one engine now there is more smoke comes out now than out of four or five then.

Q. But you have not made any investigation to find that out, that is just your view? A. I lived on Sixth Street—

Q. You didn't answer my question, have you made any investigation to find that out? A. I seen it enough.

Q. Now, tell us what investigation you made to determine that there are four times as much smoke coming from an engine now as in 1887?

A. All I can say is what I seen. What I see now is something awful and before that you couldn't see that smoke.

10 Q. That is all the investigation you have made? A. That is all I can say.

Q. Then you never made any investigation at all?

A. Just by looking at it.

Q. I ask you if you did or not, can't you tell us?

A. I couldn't say no more than what I can see.

Q. And you didn't use to make any special investigations in 1887, did you? A. No, sir.

Q. You didn't pay much attention to the smoke then, or the noise either, at that age? A. Yes, we paid attention.

20 Q. You did? A. Yes, I did.

Q. How old were you in 1887? A. Eleven years old.

Q. You were eleven years old? A. Yes, sir.

Q. Quite an expert in noise and smoke at eleven years old?

A. We lived around on the corner; I seen it.

Q. Make any investigations along other railroads? A. No.

Q. You never went to any other railroad and compared the smoke and noise made on that railroad with the smoke and noise made here? A. No, sir; I never lived any other place.

Q. You don't know how much noise is necessary in order to 30 run a railroad? A. No, sir, I don't.

Q. You don't know how much smoke is necessary to make in the burning of coal, do you? A. No, sir.

Q. You don't know anything about firing an engine? A. No.

Q. You don't know how it ought to be done or anything about it? A. No, sir.

Q. Now, then, didn't you make a little slip when you said you had observed the operation of the railroad on Sixth Street, did you mean that? A. Yes, sir.

Q. Is there any street there on Sixth Street? A. Yes.

40 Q. Where people walk on? A. Yes.

Q. How wide is that street?

A. Regular width, same as other streets.

Q. Any engines run right on that street?

A. Yes, sir, right alongside of it.

Q. You don't mean that they run in the street? *A.* No.

Q. And you don't mean that they run on top of the street?

A. No, sir.

Q. You mean they run alongside the street, that is right or not, yes or no? *A.* They run on Sixth.

Q. Is it right or not? *A.* I don't know.

Q. Can you say?

A. In one way they run on Sixth Street, as it is called, Sixth Street; they don't run in the street, but they call that Sixth 10 Street.

Q. There is no railroad in the street? *A.* There can't be.

Q. Is there, not can there be, is there, yes or no?

A. If I live on the same street.

Q. Don't tell me anything else, yes or no? *A.* No.

Q. Now, then, you say that the smoke you have seen came up high—now that is just the same as the cigarette here that the Father is smoking in the room the smoke goes up high and straight, and up in the air it blows off sidewise, isn't that the whole story?

20

A. Sometimes it goes very high, and on rainy days it comes down low.

Q. You never measured it, of course? *A.* No.

Q. And that smoke that goes up high does not bother the church, does it.

A. Generally on a fair day it goes up high, don't bother so much, but on rainy days—

Q. I asked you whether the smoke that goes up high bothers the church much, yes or no? *A.* Yes.

Q. It bothers it a lot? *A.* Yes.

30

Q. The smoke that goes up high? *A.* Yes.

Q. Just tell us how that bothers the church?

A. The cinders that go up with that smoke come down again, and if the wind is blowing toward the church—

Q. The smoke that goes up high doesn't bother the church unless the wind is blowing toward the church?

A. I don't know; no matter whether there is wind you always catch the dust there.

Q. You don't say that the cinders come against the wind, do you? *A.* I don't know.

40

Q. That is your answer? *A.* I do know.

Q. You say yes or no? *A.* Yes.

Q. They go against the wind? *A.* Yes, sir.

Q. When you are working with your ivory tools, to get a shaving off the point of the tool you blow it, don't you sometimes? *A.* Yes.

Q. And do those pieces that you blow off fly back and hit you in the face? *A.* No, sir.

Q. Explain why the wind that blows that smoke does not act the same with regard to the cinders in the smoke, that your breath does when you blow on the ivory shavings at your work?

A. I only know that much, that when I was a boy I used to 10 clean the church, and whether the wind was blowing this way or that way we used to sweep the cinders every time.

Q. What does that mean?

A. It means whether it is clear day or rainy day some comes in—not as much of course.

Q. I want you to tell me everything you know to show that those cinders come in the windows of the church when the wind is blowing against the cinders, in the opposite direction from the church, toward the railroad—tell me how you know they come into the church.

20 *A.* I don't know, but you can find them there—unless the wind blows them up from the ground, those what fell before.

Q. Now do you believe that the cinders will go against the wind and go in through the windows of the church against the wind, do you believe that? *A.* I don't say—

Q. Do you believe that? *A.* No.

Q. You don't believe any such nonsense as that, do you?

A. No.

30 *Q.* Now, how do they do in the church when the wind is from the railroad and the weather is rainy, they shut the windows, don't they?

A. They got to shut some, but they can't shut all because it would be too warm.

Q. Are they all on the side next to the railroad? *A.* No.

Q. Are there some windows on the side away from the railroad? *A.* Yes, sir.

Q. If they leave those open cinders don't come in?

A. Yes, but the air don't blow through.

Q. Do they shut the windows or not when the cinders are coming in?

40 *A.* They leave two or three open, half way, on a rainy day.

Q. On each side? *A.* On the railroad side.

Q. Do you know anything about the way the church is built, is there any ventilating system in the church?

A. I lived there all the way through they were building.

Q. Is there any ventilating system in the church?

A. I don't think so. Windows.

Q. No ventilating system in the church?

A. Not as far as I know.

Q. Now, when was the coal strike?

A. I couldn't tell you, something around three years.

Q. Did you ever examine the coal that the railroad used since the coal strike? *A.* Yes, sir.

Q. Tell us when you examined it? *A.* I looked on it.

10

Q. Where did you look on it? *A.* From the engine.

Q. How far from the engine? *A.* On the engine.

Q. You got on the engine and looked on it? *A.* Yes, sir.

Q. When did you do that?

A. On Sixth street down by the gas house.

Q. When? *A.* A couple of months ago; we were going down fishing and we looked at it.

Q. How did you do it, you got up on the engine?

A. Yes, I knew the engineer.

Q. You got up on the engine and looked at the coal? *A.* Yes. 20

Q. You didn't know anything about coal?

A. I knew the difference between soft and hard coal.

Q. That is all you know about coal?

A. That is all I want to know about coal?

A. That is all I want to know, I think.

Q. And when before that did you ever investigate the kind of coal the railroad was using?

A. I never investigated it; but I know what is hard and soft coal; all I know is before they used to burn hard coal.

Q. How do you know that?

30

A. I know it because I used to—

Q. How do you know? *A.* I seen it.

Q. Where? *A.* On the railroad.

Q. On the railroad? *A.* On the engines.

Q. When was that? *A.* A good many years ago.

Q. What year? *A.* Since my father used to work there, fifteen years ago.

Q. Now tell us what investigations you made at that time?

A. Just looked on it.

Q. Where were you when you looked on it?

40

A. In the Pennsylvania yard.

Q. Where? *A.* Near the depot.

Q. Whereabouts? *A.* The old depot, you know.

- Q. Where was the depot? A. Foot of the ferry.
Q. Down at the ferry? A. Yes.
Q. Tell us what you saw? A. Saw hard coal on the engine.
Q. Hard coal on the engine? A. Yes.
Q. Where was that engine?

A. In the yard there; there was enough of them there.

- Q. You examined more than one engine?

A. I seen more than one.

- Q. Now look here, tell us what you did?

10 Q. I looked on the coal; I know what is hard and soft coal.

- Q. Where were you when you got up on the engine?

A. No, I didn't get up.

- Q. Tell us about it? A. I seen it.

- Q. Where were you?

A. We used to go up there to take my father's dinner; right in the Pennsylvania yard there.

- Q. You didn't get up on the engines did you?

A. No, not fifteen years ago.

- Q. You didn't look at the tenders, did you? A. No, sir.

20 Q. Where was this hard coal you saw?

A. On the engine, back of the engine, where they fire it up.

- Q. You swear that, do you? A. Yes.

- Q. Now, tell us where the engine was?

A. In the yard; the Pennsylvania yard.

- Q. Did you see more than one engine?

A. More than one, certainly.

Q. You don't know what those engines were, do you; whether they were passenger or freight engines? A. Freight.

30 Q. Do you know where those engines were running; whether they were through freights or local freights?

A. Couldn't tell you.

Q. Do you know whether they were doing switching work about the yard? A. Some of them were switching.

- Q. You don't know what they were for? A. No, sir.

- Q. You didn't get up on any of them? A. No, sir.

Q. As you passed you saw some coal which you thought was hard coal? A. Yes.

- Q. That is the whole of it? A. Yes.

40 Q. Well, then, your idea is that they started about fifteen years ago to burn soft coal?

A. Oh, no, I didn't say that; I said I seen hard coal there at that time; I didn't say they started then.

Q. Then, your idea is that they never burned any soft coal until about three years ago?

A. I don't remember that, but I know that they burned hard coal before the strike.

Q. That was fifteen years ago?

A. No, it is only about three years or something.

Q. Can you say yes or no to the question of whether they burned soft coal before the strike? *A.* They burned hard coal.

Q. They burned only hard coal before the strike, is that right?

A. I couldn't tell you just only—all I seen was hard coal.

Q. I am trying to get out of you just what you mean about this hard coal business; I ask you this question—did the engines that 10 passed the church burn hard coal or soft coal in 1887?

A. That I could not tell you.

Q. Tell us about '88?

A. I couldn't tell you just about that; I can tell about fifteen years ago.

Q. Tell us about '89? *A.* Don't know.

Q. '90? *A.* I didn't take notice that time.

Q. Do you know about any year?

A. That is about fourteen or fifteen years ago we used to go there. 20

Q. You don't know what the engines burned that passed your church fourteen or fifteen years ago? *A.* No, sir.

Q. Do you know whether the engines burned hard coal that passed your church any time since 1887?

A. As far as I seen they burned hard coal.

Q. When? *A.* When the wooden trestle was there I remember there was hard coal.

Q. Nothing but hard coal?

A. I don't say nothing, but we saw engines with hard coal.

Q. You didn't see them on the trestle, you saw them in the 30 yard? *A.* I don't know.

Q. Do you know whether you saw any engines on the trestle with hard coal? *A.* I don't know.

Q. You don't know?

A. Oh, yes, I did; see trains of cars there; hard coal.

Q. Trains hauling hard coal? *A.* Yes.

Q. You don't mean to say that at any time since 1887 the engines that passed the church burned hard coal to run those engines, do you?

A. I don't know if they all burned hard coal that time; but I 40 remember well before that strike they burned hard coal; every engine I saw had hard coal.

Q. The engines in the yard or on the trestle.

A. No matter where I seen them.

Q. You want to swear that before three years ago the engines that passed the church burned hard coal, do you want to swear that? *A.* I can swear all I seen.

Q. Is it true or not? *A.* Yes, sir.

Q. Now what year did they burn hard coal?

A. I don't know just what year, but it was before the strike; after the strike they had the soft coal.

Q. Then the church was not bothered before three years ago?

10 *A.* Not as much as now; it was bothered.

Q. Were they bothered by the hard coal, too?

A. Nobody didn't say nothing; I don't know nothing about it.

Q. Can't you tell me whether they were bothered when the hard coal was being burned? *A.* Not as much.

Q. Were they bothered at all? *A.* Yes.

Q. You can't say when the hard coal was being burned?

A. Yes.

Q. What year?

A. Before the strike, between three and four years ago.

20 *Q.* Now, then, they were not bothered much just before three years ago?

A. They were bothered a little, but not as much as now.

Q. I didn't ask you as much, I asked you were they bothered much three years ago? *A.* Yes.

Q. Then it don't make much difference whether it was hard coal or soft coal, you have always been bothered a good deal?

A. Big difference; big difference.

Q. Have you always been bothered a good deal?

A. Not a good deal before; I never cared; never took notice.

30 *Q.* Until when? *A.* Until after that strike.

Q. You never bothered about it until three years ago at all?

A. No, sir.

Q. You never paid any attention to the railroad or thought much about it until three years ago?

A. No, sir; of course, there was not as many rails there then.

Q. I am not asking you that; tell me what I ask you. Well, didn't it make just as much noise in those days? *A.* No, sir.

Q. So the whole trouble has come for the last three years, that right?

40 *A.* Well, about the noise, I can only explain to you there are so many rails, so many trains now, there is more and more all the time.

Q. How many tracks were there three years ago?

A. I couldn't tell you.

Q. What right have you to be testifying to these things if you don't know what you are talking about—you understand the nature of an oath? *A.* Yes, sir.

Q. Do you understand that you are sworn to tell the truth here? *A.* Yes, sir.

Q. And you say there is more noise now because there are more tracks, and you don't know how many tracks there were three years ago? *A.* I know it wasn't so wide.

Q. Who asked you to come here and testify? The priest? 10

A. Yes, I belong to the parish and am paying in the church, and my money is there the same as everybody else's.

Q. Do you have any office in the church? *A.* No, sir.

Q. What do you mean by saying your money is in there?

A. I am paying for the church, and we had to paint it again; it was too dirty on account of the smoke; so when I heard this was going on I went over there and said I would come down.

Q. Does the father ask you for money to paint the church with especially? *A.* No, sir.

Q. But the people in the church have to pay to keep the church up? *A.* Certainly. 20

Q. And if the church has to be painted you and the other members of it have to foot the bill?

A. Nobody else to do it but the people.

Q. Why can't you say yes? *A.* Yes.

Q. Let us get this straight now. You never were bothered with the noises until three years ago?

A. I was bothered, but didn't care for it.

Q. Didn't make much difference? *A.* No.

Q. The noise doesn't amount to much to you, does it? 30

A. I don't care about noise, only the dirt.

Q. The only thing you think is the trouble is the dirt?

A. Of course, the noise, too; when you go to church you can't hear the sermon.

Q. The important thing to you is the dirt? *A.* Yes.

Q. And the dirt is important because you think it costs more to run the church? *A.* Yes, it certainly does.

Q. That is the whole story? *A.* That is right.

Q. And you don't know what kind of coal they used before three years ago? 40

A. Before that strike, all I know is before that strike they used to use hard coal.

Q. You don't mean to say that they used hard coal altogether?

A. Much as I seen.

Q. Do you mean to swear that they didn't use anything but hard coal up to three years ago?

A. I am telling the truth, all I seen was hard coal.

Q. Then you did mean to swear that you never saw any coal used there before three years ago except hard coal—that is what you come to now? A. I couldn't—

Q. Can't you say yes or no? A. I couldn't swear to that.

Q. Well, what can you swear to about hard coal up to three 10 years ago? A. I seen it used.

Q. Did you say they used it for fifteen minutes, or hours or days or what? A. Couple of years as far as I remember.

Q. You say for a couple of years they used hard coal?

A. I don't know how many years; couldn't tell.

Q. Do you know anything about it?

A. Yes, they did use it.

Q. You can't tell us when? A. Before the strike.

Q. Yes, but a great deal went on in this world before the strike, you can't fix any year before the strike? A. Yes.

20 Q. What year? A. The year before the strike.

Q. Then you say the year before the strike they used hard coal? A. Yes, sir.

Q. Did they use hard coal on the part of the railroad in front of the church? A. Yes.

Q. Did they use hard coal on all the engines passing that part of the railroad?

A. As much as I seen, all I seen was hard coal.

Q. How much did you see? A. I used to live on the corner.

Q. But you said you didn't pay any attention until three years 30 ago? A. Did I say I didn't pay any attention?

Q. Yes, so this hard coal that you saw on the engines was during the years that you were paying no attention.

A. I paid that much attention to look on the coal.

Q. I am asking you whether it was so or not?

A. Have to look on it to see it.

Q. Can you answer that yes or no? A. Yes.

Q. Do you want to change your answer when you said you didn't pay much attention until three years ago?

A. I paid that much attention that I seen hard coal.

40 Q. And how much attention did you pay—how many engines did you say had hard coal on them?

A. That I couldn't say.

Q. You don't know whether it was on all the engines or on one engine? A. All I seen, all that passed there.

Q. All that passed there?

A. All I seen; sometimes Sundays I would sit by the window and I would see them pass.

Q. And you watched every engine?

A. I couldn't say every engine.

Q. And yet this was during the time that you were not interested in the matter because you were not paying much attention, was it? *A.* I didn't have any business to.

Q. You were not paying any attention? *A.* No.

Q. And you didn't pay any attention whether they were using hard coal during that period or not, did you or not? *A.* Yes.

Q. So while you were not paying any attention you were very carefully watching to see whether they used hard coal, is that right? *A.* Yes.

Q. That is right? *A.* Yes.

Q. What was it that interested you so much in finding out whether they were using hard coal during this time when you were not interested in any of the troubles that came from the thing?

Mr. Hardenbrook—Objected to, that it is not in conformity with the witness' previous answers, and that he has not testified that he paid no attention at any time. 20

Q. Answer? *A.* I always lived on Sixth Street; when soft coal was burned we got the smoke and we moved away from the corner.

Q. When did they start to burn it? *A.* After the strike.

Q. And they never burned any soft coal before that?

A. Not as far as I know.

Q. And you never paid any attention?

A. I didn't have any business to pay any attention. 30

Q. There was nothing to draw your attention to it?

A. Just as much as that I knew they burned hard coal.

Q. But you didn't know it from having your attention drawn to it or watching it? *A.* No.

Q. How long ago was that wooden trestle there?

A. That I couldn't tell.

Q. You don't know how long the embankment has been there; that stone embankment? *A.* What stone?

Q. Isn't it stone? You don't know how long it has been there? 40

A. I remember when they built it, but I don't know how many years.

RE-DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. About how often did you take your father's dinner to him at the Pennsylvania yard?

A. When I was not working I took it every day.

Q. For about how long a time? A. About two months.

Q. Two months? A. Two or three months.

Q. Was your father, at that time, employed by the Pennsylvania Railroad Company? A. Yes, sir.

Q. In what capacity? A. In the yard.

10 Q. One of the men in the yard? A. Yes, sir.

Q. What work was he doing there?

A. He was one of the galvanizers.

Q. When you speak in reference to the time when you noticed that there was a difference in the kind of coal used, and the change made from hard coal to soft coal, you fix that time as the time of what they called the strike? A. Yes.

Mr. Wall—Objected to, not proper re-direct and leading.

Q. What strike do you refer to?

20 A. All I know, the coal strike.

Q. And when you say that you noticed this change three years ago in the kind of coal used, you don't mean to state that it was three years ago, but you mean to fix the time as previous and subsequent to the coal strike, irrespective of the question as to whether the coal strike was three years ago or more?

Mr. Wall—Objected to on the ground that the question is outrageously leading, and that the answer of the witness will be absolutely without probative force because the whole answer has been suggested by counsel.

30 Q. What is your answer?

A. I said I don't remember just exactly; something around there.

Q. When you fix the time when the change was made in the kind and character of the coal, you wish to fix that time as the time of the coal strike, do you?

Mr. Wall—Same objection as before to its leading and improper quality.

A. Yes.

40 Q. And you wish to confine the time to the time of the coal strike?

Mr. Wall—Same objection.

Yes.

Q. And when you say three years ago, you mean to state a period of time which dates from the coal strike, do you?

Mr. Wall—Same objection.

Q. Yes, sir.

Q. Now do you know about when that coal strike was?

A. I don't know; it seems to me something around there.

Q. I ask you to put your memory on it and see if you can give any idea as to about when that coal strike was?

A. I couldn't just tell you now.

Q. Is it as much as three years ago? *A.* I guess so. 10

Q. You cannot fix the time? *A.* No.

Q. Describe the difference in the appearance between hard coal and soft coal, as you understand it?

Mr. Wall—Objected to on the ground that this witness has not been qualified as an expert in coal and has given evidence that he has not the requisite knowledge to testify to any more than any one knows by observation.

Q. The question is—pay attention to me; describe the difference in appearance between hard coal and soft coal as you understand it? 20

Mr. Wall—Same objection.

A. It is a difference in hard coal—

Q. The difference in looks as you understand it?

A. I understand, certainly I do.

Q. Go on, answer the question?

A. Soft coal is soft, soft; when you throw it down it falls into pieces; hard coal, it is pretty hard to break it.

Q. You have described the difference in the hardness of the coal; can you describe the difference in the appearance in the 30 looks of it?

Mr. Wall—Same objection.

A. Yes, sir; that is more black, and this is hard, shiny like, more glassy.

Q. Which is the more glassy of the two? *A.* Hard coal.

RE-CROSS-EXAMINATION, by Mr. WALL:

Q. Your lawyers asked you, the lawyer for the church asked you some question that had the word irrespective in it; he just asked you a question that had the word irrespective in it, you 40 don't know what the word irrespective means, do you?

A. Yes, sir, not to tell any different tales.

Q. I asked you if you know what it means? *A.* Yes, I know.

Q. What does it mean? *A.* To tell it straight and no tales.

Q. That is what you understand the word irrespective to mean?

A. Yes.

Q. To tell the truth? *A.* Yes.

Q. Now you say the coal strike, what coal strike do you mean?

A. That was the big coal strike where the coal went up so high.

Q. The big coal strike, how long ago was it?

A. That is what I said; I am thinking it is something like 10 three years ago.

Q. Was it nine years ago? *A.* I don't know.

Q. Do you say it is the biggest coal strike we have had in the last fifteen years, that right?

A. It is not as far as that.

Q. I don't mean it was as far back as that—you say it was the big coal strike? *A.* Yes.

Q. Biggest one had since when? *A.* Since I remember.

Q. Since you remember? *A.* Yes.

Q. The biggest one we ever had in your time?

A. Yes. I don't know whether it is the biggest or not, but what I took an interest in.

Q. It was the time when coal went up to \$12 a ton?

A. Something like that.

Q. About \$12 a ton to people in dwelling houses? *A.* Yes.

ANNA MENDRES, called as a witness for the plaintiff, being duly sworn according to law on testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. You are the wife of the last witness? *A.* Yes, sir.

Q. And you are a member of the Roman Catholic Church of St. Anthony of Padua? *A.* Yes.

Q. You attend service there? *A.* Yes.

Q. About how many years past? *A.* Fifteen years.

Q. You attend service how frequently?

A. Every other Sunday or third Sunday.

Q. About every other Sunday in the month? *A.* Yes.

Q. That has been your custom for about how long?

A. Last fifteen years.

Q. Do you attend any of the evening services?

A. Once in awhile.

Q. About how often?

A. Last May, four or five times I have been there.

Q. During the month of May? *A.* Yes.

Q. The month of May is a month which is devoted to services of a certain character, more than any other month?

A. Yes, sir, every night.

Q. And not confining your answer to last May, how frequently do you attend evening service there?

A. Every Sunday before I was married I attended every Sunday, but since I was married I have not had as much time.

Q. How long since you were married? *A.* Nine years.

Q. Where do you live? *A.* On Sixth Street.

Q. Whereabouts? *A.* 218, between Grove and Erie.

Q. Is that the block immediately to the east of the block bounded by Monmouth and Brunswick? 10

A. That is two block below I think; two or three.

Q. Have you ever observed the operation of the Pennsylvania Railroad immediately opposite the Parish house and school house of the plaintiff in this action? *A.* Yes.

Q. Now, take up the different elements one by one, don't mix them up altogether; what have you noticed in connection with the operation of that railroad on that block or between the blocks?

A. I noticed that they have a good deal of going back and forth in that place which causes a lot of disturbance during church services. 20

Q. What disturbance?

A. Such as puffing of steam, and the engines get together, or the cars coupling as they call it.

Q. Coupling?

A. Yes. The noise it makes you would just imagine the train was coming off the track.

Q. Now, what else have you noticed, anything else in addition to the puffing of steam and noise of the coupling of the cars? 30

A. Well, when they stand there and the letting out of steam makes a great amount of noise; also the smoke comes out in a rush; that makes a lot of noise.

Q. Have you frequently observed this puffing of steam?

A. As often as I have been up there.

Q. How frequently is that?

A. When I go to church Sundays, and sometimes during the week, but not as often as Sundays.

Q. You frequently attend service during the week days?

A. Yes, sir.

Q. About how often?

A. When there is occasion for a holiday; that may be twice a month, or once a month. 40

Q. Have you noticed anything else in the way of noise in addition to this puffing of steam, blowing off of smoke and coming of the cars together? *A.* No.

Q. Those the only noises which you have noticed?

A. That is all.

Q. When you were attending service at church have you ever noticed those noises in the church. *A.* Yes, sir. Very much.

Q. To what extent?

A. When there is a sermon you can hear the preacher's voice, **10** but you cannot distinguish the words for the few minutes the noise would be going on.

Q. Have you ever noticed whether the Father has had occasion to suspend during these noises?

A. Oh, yes, he had to stop for a few minutes.

Q. How frequently have you noticed that?

A. Almost every time I have been to church.

Q. Now, this smoke which you say you have seen coming from the engines, what is the kind, color and character of it so far as your personal observation goes?

20 *A.* It is black smoke, and it carries with it cinders and also a sort of a substance like grease.

Q. Is there much, the quantity which you have seen coming from these engines?

A. Yes, quite a good deal.

Q. About how high would it be?

A. That I couldn't say, for I have never noticed how high, but I have seen it coming through the windows.

Q. You can't tell how high?

A. I couldn't definitely say; I have seen it go up high, but I **30** didn't stop to notice how high.

Q. Have you ever noticed any of this smoke coming into the church? *A.* Yes, sir.

Q. Through the open windows of the church? *A.* Yes.

Q. How frequently have you noticed that?

A. Mostly during the summer months.

Q. How frequently? *A.* As often as I have been there.

Q. What quantities, if you can give any definite idea?

A. I couldn't say; it was like a large volume of smoke would come right through the window and across to the other side of the church. -

40 *Q.* Have you noticed whether this smoke carries any substance? *A.* This cinders and greasy substance.

Q. Have you ever noticed those cinders and greasy substance being deposited in any portion of the church?

A. Yes, on the seats, sills.

Q. How frequently have you observed that?

A. As often as I have been in there and the windows open.

Q. Have you noticed what effect that has on your clothing?

A. Yes, you have got to lift your clothes and shake it off, and if the grease comes and you try to brush it off it smears all over the clothes.

Q. Have you children that attend service there?

A. No, they do not; they are too small.

Q. Have you noticed the effect this smoke had on the clothes 10 of any members of the congregation?

A. No, sir, I didn't notice.

Q. This steam, which you say you have seen emitted from the engines, have you ever noticed any quantities of that?

A. No, only I could see large white cloud.

Q. Have you seen that coming into the church? *A.* Yes, sir.

Q. And is there any odor attached to this steam, any smell perceptible?

A. I wouldn't say as to the steam, but the smoke, there is kind of a dark thick smell; when it comes in it kind of smothers 20 you.

Q. Have you ever been in the rectory where the priest resides?

A. Yes, three or four times.

Q. Have you ever noticed this substance while in the rectory?

A. Yes, in the rooms I was in, hall and side room.

Q. Have you ever been in the school building? *A.* Yes, sir.

Q. How frequently?

A. Very often. I couldn't say how many.

Q. Once a month?

A. More than once a month; when they had the fair there I 30 was there every day for two weeks.

Q. When was that? *A.* I can't say.

Q. What year? *A.* It was five or six years ago.

Q. Did you ever notice any of these substances such as you have described in the school? *A.* Yes, sir.

Q. Whereabouts?

A. On the sills, and on the radiators, and on the benches.

Q. Have you ever noticed these noises such as you have described, while in the schoolhouse? *A.* Yes, sir.

Q. Have you ever noticed whether the noise was sufficient to 40 interfere with conversation? *A.* Oh, yes, very much so.

Q. Have you heard the noises while in the rectory?

A. Yes, I had to speak much louder than at any other time at the time of the noise.

Q. I show you a substance contained in an envelope, which has been marked "Ex. C₃ for Identification," and I ask if you will look at the substance in that envelope, and state how that compares in character and appearance with the substance such as you have testified you have seen in the church and in the rectory and in the schoolhouse?

Mr. Wall—Objected to on the ground that it is incompetent, and for the reasons previously given in objecting to this same sample.

10 *A.* It is just like what I have seen in there.

Q. I ask you the same question in regard to the substance contained in envelope marked "Plaintiff's Ex. 2 for Identification."

Mr. Wall—Same objections.

A. Do I answer? Yes, it is just the same.

Q. I ask you the same question in regard to the substance in envelope marked "Plaintiff's Ex. 1."

Mr. Wall—Same objections.

A. Yes, sir; it is just the same.

20

CROSS-EXAMINATION, by Mr. WALL:

Q. One of the witnesses here said that the stuff in the envelope seemed to be rather heavier than the stuff found inside the church, do you agree with that?

A. It may be heavier on rainy days.

Q. No, he said that the particles in the envelope seemed to him to be bigger, heavier, than the particles that he had seen come into the church, did you notice the same? *A.* Yes, sir.

Q. That is true of all these samples? *A.* Yes, sir.

30 *Q.* Do you recall when this big coal strike was, with reference to the time when you were married? *A.* I do.

Q. Was it just about the time that you were married?

A. Close around that; I couldn't say exactly before or right after.

Q. Wouldn't you remember a thing like the cost of coal being pretty high when you first got married? *A.* Yes, I do remember.

Q. That is a thing that young married people would naturally think of? *A.* I don't know; some would, others wouldn't.

Q. You did though, didn't you? *A.* I couldn't say that I did.

40 *Q.* It was about nine years ago? *A.* Around nine years, yes.

TAKLA BAKAZA, called as a witness for the plaintiff, being duly sworn according to law, on oath, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Where do you live? *A.* 37 Jordan Ave.

Q. Jersey City? *A.* Yes, sir.

Q. Are you a member of the Roman Catholic Church of St. Anthony of Padua? *A.* Yes, sir.

Q. How long have you been a member of that church?

A. About twenty-one years.

Q. How frequently do you go to church? *A.* Every Sunday.

Q. What service do you attend there? *A.* From eleven to one.

Q. Eleven to one? *A.* Yes.

Q. That is, Sundays? *A.* Yes, sir.

10

Q. Any vespers in the evening? *A.* Sometimes; yes, sir.

Q. About how long do the vespers last in the evening?

A. I could not say.

Q. Fifteen minutes or two hours? *A.* About an hour.

Q. Have you observed the operation of the railroad in front of the church? *A.* Yes, sir.

Q. What have you seen in connection with it; what have you noticed? *A.* I seen smoke and noise and steam.

Q. Steam? *A.* Yes, steam makes a noise.

Q. What have you noticed in regard to the smoke? 20

A. Black smoke.

Q. How frequently have you observed black smoke; where does this smoke come from? *A.* From the engines.

Q. How frequently have you observed black smoke coming from the engines, how often; how often have you seen it?

A. About ten or fifteen minutes.

Q. At a time? *A.* Yes.

Q. About how many different occasions; how many times?

A. Between service.

Q. How many years have you noticed that?

80

A. Since I go to the church; about ten years ago.

Q. How many years have you noticed smoke coming from these engines?

A. I used to go to church since I lived in Jersey City and I see the smoke; it wasn't so bad like now, last couple of years; not so bad as just now last couple of years.

Q. In what quantities have you observed this smoke coming from the engines?

A. Sometimes more and sometimes not so much; in cloudy weather there comes more.

40

Q. You say you have noticed noises there, what noises?

A. Noises from the engine and cars and from the steam and smoke from the engine.

Q. What noises have you noticed from the cars, describe that.

A. Something like cars, I can't describe the noise.

Q. What have you noticed in connection with this steam?

A. That is what it is, steam.

Q. That is what it is? *A.* Yes, sir.

Q. What have you noticed in connection with that steam, any noise? *A.* Yes, yes, sir.

Q. Can you describe that noise, could you state what kind of a noise?

10 *A.* Noises just like an engine blow and whistle, something like that.

Q. Did you ever notice the engines whistling? *A.* Yes, sir.

Q. How frequently? *A.* About five or ten minutes.

Q. While in church have you ever noticed any of this smoke coming into the church? *A.* Yes, sir.

Q. How often have you noticed that?

A. I couldn't tell exactly how often, but a good many times; there is lots of the dust there and you have to wipe it off the seats and sometimes I get it on my clothes—

20 *Q.* About how often have you noticed the smoke coming into the church *A.* About five or ten minutes, longer than that.

Q. That is the length of time, I am asking you how often?

A. How many years?

Q. How many times a year?

A. I couldn't say that; every time I go in the church; any time I go in the church.

Q. That is an answer, every time you go to church? *A.* Yes.

Q. Have you ever noticed any of this steam coming into the church? *A.* Yes, sir.

30 *Q.* How often? *A.* Every time I go to church.

Q. Have you ever noticed whether or not this smoke carried with it any particles or anything? *A.* Kind of like dust, black dust, soot.

Q. Have you ever noticed any of that dust or black soot in the church itself? *A.* Yes, sir.

Q. Where? *A.* On the bench and on the sills.

Q. Have you ever noticed what effect it had on your clothing when your clothing came in contact with it? *A.* Yes, sir, I seen it.

40 *Q.* What effect did it have on your clothing?

A. Well, I get dust and black spots come from the smoke.

Q. Does it wash out?

A. Sometimes it wash out but not so very easy; sometimes kind of like grease, cannot wash it out.

Q. How long a time have you noticed that, how long back—
how long a time have you noticed this?

A. Three years, or more than that.

Q. More than three years?

A. Yes, because I used to send the children to school and their
clothes get all dirty and I ask them where they get it and they
say the dirt in the school.

Mr. Wall—Objected to.

Q. Have you children members of that church going to
church? *A.* Yes, sir. 10

Q. Boys or girls? *A.* Boys and girls both.

Q. How many? *A.* Four.

Q. Four children? *A.* Yes, sir.

Q. Have you ever noticed this substance on their clothing?

A. Yes, sir.

Q. What effect did it have on their clothing?

A. They get dirty black spots and kind of dusty.

Q. These noises which you have testified as having heard, have
you ever heard that in the church? *A.* Yes, sir.

Q. How often, about how often, once a month? 20

A. Every Sunday, every time I go to church.

Q. Have you ever noticed what effect these noises had on
your ability to hear the words of the officiating priest—can you
hear the priest when those noises are going on?

A. No, sir; good many times he have to stop for a few
minutes; couldn't hear a thing.

Q. Have you ever been in the rectory? *A.* Yes, sir.

Q. Have you ever noticed these noises in there? *A.* Yes.

Q. Have you ever noticed what effect it had on the conversa-
tions or ability to hear while in the rectory? *A.* Yes, sir. 30

Q. Would it interfere with conversation?

A. Yes, sir, I seen lots of the dirt and steam and smoke.

Q. I am asking you about the noise? *A.* The noise?

Q. Would the noise in the father's residence interfere with
conversation? *A.* Yes, sir.

Q. Have you ever been in the school house? *A.* Yes, sir.

Q. How often you been in the school house?

A. Twice in a week sometimes; sometimes once in a week;
sometimes I used to go every day.

A. Nine years ago I sent the children.

Q. Down to the present time—when did you cease sending
them?

A. Nine years ago I stopped sending them to school.



Q. How recently were you in the school, when were you in there last time?

A. I have not been there since last fall, because I didn't send any more.

Q. You have not been in the school since last fall?

A. No, sir.

Q. What have you noticed while in the school house as to this smoke, ever see it in there?

10 A. Yes, sir, just the same like in the church, steam and smoke and black kind of soot.

Q. Have you ever noticed any accumulation of it in the school house, any quantity of it in the school house? A. Yes.

Q. Whereabouts in the school have you noticed it?

A. By the windows, the window up.

Q. Did you send your children to school there? A. Yes, sir.

Q. Did you ever notice what effect it had on the children's clothing while at school? A. Yes, sir.

Q. What?

20 A. The clothes did get dirty and dusty, and I have to ask them where they get so dirty and they say in the school.

Mr. Wall—Objected to.

Q. Is that dirt which they would get on their clothes while at school different from the ordinary street dirt?

A. Yes, it is different.

Q. In what respect—how does it differ from the ordinary street dirt?

A. I know it is different; didn't have such black spots from the street like from the school, like from the engine, this black soot.

30

CROSS-EXAMINATION, by Mr. WALL:

Q. How long have you been going to the church?

A. How long? I used to go to church twenty years, since I was in Jersey City.

Q. You said twenty-one years?

A. That is right, the old church—that church is built new.

Q. Where was the old church? A. That is in the same place.

Q. Right in the same place?

A. Yes, the old one moved out and they built the new one.

40

Q. And what did they do with the old church, tear it down?

A. They just moved it.

Q. And put the new church in the same place? A. Yes, sir.

Q. Any trouble in those days from smoke or noise?

A. I don't remember so much about that.

Q. Never saw any dirt come in the windows?

A. Yes, it was so, but not so much as there now; I never get so much like I get now; but any time I go there have to stop the service.

Q. That is from the noise? *A.* Yes, sir.

Q. They never used to stop twenty years ago from the noise?

A. I don't know about that.

Q. You don't know? *A.* Yes, when the priest—

Q. Did you ever see the priest stop twenty years ago? 10

A. No not so bad as that; I never see that twenty years ago.

Q. No smoke coming in there twenty years ago was there?

A. I don't remember that.

Q. You wouldn't say that? *A.* No, I wouldn't say that.

Q. The smoke used to come in twenty years ago?

A. I don't remember that twenty years ago; but I remember that about nine or ten years ago, but not so far as that.

Q. Not so much? *A.* Yes, sir.

Q. Same thing, but not so much? *A.* Yes, sir.

Q. You mean there are more engines now? 20

A. I don't know anything about that; I know very well there was not so much coming into the church like that there now; steam and smoke.

Q. No dresses ever got dirty fifteen years ago?

A. I don't remember that.

Q. You don't know whether there was any dust on the seats fifteen years ago? *A.* Yes.

Q. Same old dust as now? *A.* Not much as now.

Q. Same kind; not so much, but same kind?

A. I don't remember that.

30

Q. You don't remember that at all? *A.* No, sir.

Q. You cared more about dress fifteen years ago than now?

A. I guess I am.

Q. What? *A.* I guess I am.

FATHER KASPRZYCKI, called as a witness for the plaintiff, being duly sworn according to law, on oath, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. You are a priest of the Roman Catholic Church? 40

A. Yes, sir.

Q. And have been for how many years?

A. I am here in America—

Q. How many years a priest?

A. Twelve years—eleven years and six months.

Q. And you are connected with the Roman Catholic Church of St. Anthony of Padua? A. Yes, sir.

Q. In what capacity? A. I was assistant in Germany—

Q. How long have you been connected with St. Anthony's church? A. Since eight months.

Q. Last eight months? A. Yes.

Q. Eight or eighteen months? A. Eighteen months.

10 Q. In what capacity have you been connected with St. Anthony's church? A. I was assistant parish priest to Father Kwyatakowki.

Q. Have you observed the operation of the railroad immediately in front of the church?

A. Yes, my rooms are situated in the rectory on the third floor and I can observe through my windows.

Q. From your window? A. Yes, sir.

Q. The railroad is immediately across the street upon which your window faces? A. Yes.

20 Q. Now, state in detail, Father, what you have observed in relation to the operation of this railroad; take up one element at a time and do not try to bunch them all in one word.

A. There are very many engines, many trains; then, engines come into this block there and make very much noise at different times.

Q. I will ask you the question, are there more engines passing at one time of the day than at other times?

A. At the same time sometimes three or four or five engines.

Q. Is this true at night as well as in the day time?

30 A. Yes, same thing.

Q. Would you say, from your observation, that there are more trains or less trains than in the day time?

A. It is different on different days.

Q. Sometimes more trains day times; sometimes more in the evening? A. Yes, I think so.

Q. And this is true of Sundays as well as week days?

A. On Sunday afternoons are less trains.

Q. You spoke about the noise, what have you noticed about that? A. The noise is terrible, unbearable.

40 Q. What noises are they?

A. Puffing, whistling; I think it must be if the trains are too heavy and the engines do not have enough power, then the trains are standing in the same place, same spot, and the wheels go around and round and there is a very great noise.

Q. Can you describe what that noise consists of?

A. I think it must be the wheels going around.

Q. Is there any steam emitted from the engines? *A.* Yes.

Q. Does it make any noise? *A.* Yes.

Q. Then why don't you go ahead and tell in your own language what noises you hear?

A. The steam, also the whistling—

Q. Go ahead, state what noises you hear, specify them?

A. Whistling, noise from the steam, tossing of the cars, puffing of the steam from the chimneys; also if the trains are too 10 heavy and the engines cannot go forward, I have observed sometimes the wheels go round and the train stands on the same spot.

Q. Have you noticed the trains or the engines standing for any particular length of time on the tracks opposite the church property, standing still? *A.* Different engines, yes.

Q. You have noticed them standing for any particular length of time?

A. Yes, sometimes for twenty minutes to half an hour.

Q. What would those engines be doing?

A. I think they have to wait for the switches, I don't know. 20

Q. Would there be any smoke emitted?

A. That is different; sometimes smoke, sometimes not.

Q. How about the steam? *A.* Not very much, sometimes yes.

Q. How frequently have you noticed trains standing on the track there?

A. That is nearly every day; near, not every day.

Q. What is the general character of this smoke which you say you have seen?

A. The smoke comes sometimes very heavy; sometimes not so heavy; the color is also different; I think it depends on the 30 weather; if the weather is clear and the air is light, I think then the smoke is darker; if the weather is cloudy then I have observed it sometimes the color of the smoke is not so dark, it is dark, gray.

Q. Do you think from what observation you have made, do you think the smoke itself varies in color, or that the appearance of the smoke differs as to the atmospherical conditions?

A. Atmospherical conditions, yes.

Q. But the smoke itself is on all occasions the same?

A. I think so.

Q. But the atmospherical conditions have a different effect on the smoke? On the appearances of the smoke? *A.* Yes. 40

Q. How often have you noticed this during the eighteen months that you have been there?

Mr. Wall—Objected to; the question includes a period since the filing of the bill.

Q. Answer the question, how frequently have you observed this during that time?

A. It is different at different times; sometimes very much, sometimes not.

Q. How frequently? *A.* Every day; that is every day.

Q. And about how often a day?

A. Sometimes in the morning and afternoon it is different
10 by different engines.

Q. What effect has the emission of this smoke had so far as your rooms are concerned in the rectory?

A. That depends also upon the wind, whether the wind blows from the south or east or west; then comes very much smoke into my room, but fair weather, when the wind is from the north, I have not observed it.

Q. And how as to the steam? *A.* The steam comes also.

Q. What effect does this steam and smoke have upon the articles in your room?

20 *A.* It comes in there like soot and coal dust.

Q. What effect does it have on the furniture?

A. Makes it all dirty.

Q. Have you noticed that in other rooms in the rectory?

A. Yes, sir, all the other rooms, in the rooms of Father Kwyatakowki and in the dining room.

Q. Have you ever been in the school house?

A. Yes, I go there every day.

Q. For about how long? *A.* For the past year.

Q. How long do you remain there?

30 *A.* Five days from Monday to Friday, every day; from ten o'clock in the morning till about half past eleven.

Q. Have you noticed this substance coming into the school-house? *A.* Yes, sometimes.

Q. Where have you noticed any accumulation of it in the school-house; any quantity of it in the school-house? *A.* Yes.

Q. Whereabouts in the school-house? *A.* The noise?

Q. The smoke; the particles coming from the smoke?

A. Sometimes on the desks and on the benches.

Q. Have you ever noticed it in the church?

40 *A.* In the church, yes; usually in the linen upon the altar.

Q. How frequently have you noticed it coming into the church? *A.* That is different.

Q. Depends on the wind? *A.* Depends on the wind.

Q. What would you say would be a fair average of the number of times, say a month, that it comes?

A. In the month, at least ten times a month, at least; I think that is small; I think it is more.

Q. Have you noticed what effect it had on any of the articles or furnishings of the church?

A. Very dirty from the dust and from the soot; coal soot.

Q. Can you specify any particular articles in the church discolored by reason of it?

A. The linen upon the altars is dirty, soiled from these articles from the smoke. 10

Q. Inside the church? *A.* Yes.

Q. Can you designate or specify any particular articles in the church? *A.* Yes, the pictures also smoked.

Q. Anything else besides the pictures?

A. And the benches, the seats, the floors, all dirty.

Q. Anything else? *A.* The walls also.

Q. Anything else? *A.* Walls, pictures, benches, altars.

Q. Anything else? *A.* The linen.

Q. Linen used in the church services? *A.* Yes, sir. 20

Q. Now, we will take up one of these things at a time; what effect have you noticed on the linen used in the church service?

A. If I am singing a high mass, sometimes the people cannot understand, or sometimes the organist cannot understand to respond; sometimes the people cannot understand if I am preaching, or if I am singing a high mass the organist cannot hear to respond at the right time.

Q. Do you know what I asked you; what did I ask you?

A. What effect the noise—

Q. I didn't ask you anything of the kind; listen to my question. You designated certain articles in the church which this smoke affected; among other things you spoke of the linen, and I asked you what effect it had on this linen used in the church service? *A.* There are black spots on it, dirty, that's all.

Q. What effect have you noticed it had on the altar; you said you noticed the altar.

A. Yes, it affected—the smoke; how did it affect the altar—I would say the noise—

Q. I am not asking about the noise; I am talking about the smoke, how did it affect the altar? *A.* Well, I don't know. 30

Q. Did it discolor it?

Mr. Wall—Objected to, he said he don't know.

Q. About the pictures? *A.* The pictures are smoky.

Q. Discolored? *A.* Yes.

Mr. Wall—I ask that that be stricken out; the word was put in the witness' mouth by the examiner.

Q. Have you observed what effect—have you noticed whether there was any substance brought into the church with this smoke?

A. Yes, it looks black.

Q. Have you, at any time, made any collection of any of that substance? *A.* No.

Q. Did you notice this black substance in the church to any 10 extent; much or little? *A.* Sometimes much, sometimes less.

Q. Whereabouts in the church have you seen it?

A. Mostly upon the linen upon the altar.

Q. On the altar? *A.* On the altar.

Q. Have you ever noticed it on the seats where the parishioners sit? *A.* I can't tell that.

Q. Have you ever noticed what effect it had on the clothing of anyone? *A.* Yes, the clothing becomes dirty.

Q. Now, take up this element of noise, to what extent have you heard the noise such as you have described in the school?

20 *A.* In the school, yes; I go between ten and half past eleven; sometimes during ten or fifteen minutes the sisters that teach cannot teach; it is impossible to hear.

Q. What have you observed? *A.* It is not every day, but sometimes.

Q. What have you observed in connection with the noise in the rectory? *A.* In the rectory it is the same.

Q. Interferes with the conversation? *A.* Yes.

Q. What have you noticed in connection with the noise in the church?

30 *A.* During the services the people cannot understand the priest preaching; also the organist sometimes cannot hear at the right time to respond to the priest singing the high mass.

Q. Have you yourself officiated in these masses? *A.* Yes, sir.

Q. You have conducted the masses? *A.* Yes, sir.

Q. Have you ever personally observed any interference with your ability to be heard, by those noises, you yourself?

A. I don't just understand.

Q. Have you ever, when conducting the mass yourself, noticed any interference by reason of this noise with your ability to conduct the mass, the people to hear? *A.* Yes.

Q. To what extent have you had to suspend?

A. Yes, I have had to suspend; have to wait until the noise ends.

Q. How frequently have you had to suspend, about how often does that happen? *A.* Once or twice in the month.

Q. I show you a substance contained in an envelope marked "Ex. 3 C," and I ask you if you will look at it and state how the substance contained in this envelope appears in character with the substance which you have seen in the church and in the school and in the rectory?

Mr. Wall—Objected to on the grounds heretofore given on the production of this sample and similar samples.

10

A. Yes, that is the same.

Q. I ask you the same question in reference to the substance contained in envelope marked "Plaintiff's Ex. 1 for Identification"?

Mr. Wall—Same objection.

A. Yes, that is the same.

Q. I ask you the same question in regard to the contents of envelope marked "Plaintiff's Ex. 2 for Identification"?

Mr. Wall—Same objection.

A. Yes, that is the same.

20

CROSS-EXAMINATION, by Mr. WALL:

Q. How often do you clean in the rectory?

A. Every day except a holiday; one girl is only for cleaning the house.

Q. That been so ever since you came? *A.* Yes.

Q. Clean all the time? *A.* All the time, yes.

Q. Sweep all the time?

A. Cleaning all the time; she cleans all the time, from morning till night.

30

Q. Sweep?

A. Sweep; I could not tell you everything about cleaning the house.

Q. Don't you have any special cleaning on Saturdays?

A. Yes, electric machine on Saturdays.

Q. On Saturdays? *A.* Yes.

Q. Saturday regular day? *A.* Yes, Saturday also.

Q. Any more than any other day?

A. Every day except Sunday?

Q. Is Saturday more specially a cleaning day than Friday?

40

A. I think, yes, more to do on Saturday.

Q. Saturday is the great cleaning day? *A.* Yes.

Q. Now, what day of the month did you come to that church?

A. I came as assistant on the first of January, last year, 1910.

Q. You been there since January 1, 1910? *A.* Yes.

Q. You never examined the clothing to see if it became dirty?

A. Well, I wear black.

Q. You never examined it? *A.* No.

Q. You would have to wash the linens around the altar anyway? *A.* Yes.

Q. How often would you have to wash the linens?

A. I don't know.

10 *Q.* But in a good church you always keep the linens clean?

A. Yes, certainly.

Adjourned to July 12, at ten A. M.

In the Circuit Court of the United States for the District of New Jersey.

20 ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA,

*Complainant,
against*

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Testimony.

Hearing before Hon. George R. Beach, Examiner, appointed by virtue of an order of Judge Joseph Cross in the above-entitled matter, dated the 15th day of June, 1911, at the office of Mr. Beach, 75 Montgomery street, Jersey City, July 12th, at 1 30 o'clock P. M.

Appearances—Mr. F. M. HARDENBROOK, of counsel for the complainant; Mr. ALBERT C. WALL, of counsel for the defendant, the Pennsylvania Railroad Company.

JESSE DAVIS, called as a witness by the complainant, being duly sworn according to law, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. What is your full name, please? *A.* Jesse Davis.

Q. What is your business? *A.* Photographer.

40 *Q.* How long have you been engaged in the business of photography? *A.* Twenty-five years.

Q. Where is your place of business at the present time?

A. 238 Warren street.

Q. Jersey City? *A.* Yes, sir.

Q. Are you acquainted with the location of the Roman Catholic Church of St. Anthony of Padua? *A.* Yes, sir.

Q. Next door to the corner of Sixth street, on Monmouth street, Jersey City? *A.* Yes, sir.

Q. Did you at any time go to that church for the purpose of taking certain photographs? *A.* Yes, sir.

Q. And when was that?

A. It was in the month of October, three years ago, 1908.

Q. How many times did you visit that church during that month? 10

A. I cannot exactly say; about three or four times to get one picture.

Q. Just state in detail what the conditions were which you found existing on these three or four occasions when you visited the church for the purpose of making a picture?

Mr. Wall—Objected to as incompetent.

A. The first time I go there, I go to see the father to get permission to take a photograph of the children of the school, and after I get through taking the children of the school I take the exterior of the school, and then the church and interior; and when I made the children of the school—sixteen classes I believe it was—then I took the exterior of the school, and the exterior of the church, from the roof across the street; and I went into the church after they got through with some wedding there, and I put the camera up, and in looking through the camera I couldn't see the top of the altar; the top of the altar was all fog; you couldn't distinguish anything there, and I figured that it was necessary to waste the plate on it, because you couldn't make it successful.

Q. When you say "fog" do you refer to moisture in the air? 30

A. It was smoke; you could see it was smoke.

Q. What sort of a day was it that day? *A.* Clear day.

Q. And about what time of the day was this?

A. It was in the afternoon; I couldn't exactly tell what time it was; it wasn't later than 3 o'clock.

Q. Between one and three, about? *A.* About that.

Q. Did you subsequently visit the church for the same purpose? *A.* Three times.

Q. Within what interval? *A.* In one month.

Q. And what was the condition that you found existing on 40 these other two occasions?

A. Same thing; couldn't get any picture.

Q. I show you a photograph and ask you what that is?

A. That is the interior of St. Anthony's Church.

Q. Was the negative of that photograph taken by you and developed? *A.* Yes, sir.

Q. About when did you take that photograph?

A. Not long ago.

Q. How long ago? *A.* About four or five days ago.

Q. Is that a correct representation of the objects as they existed at the time you took that photograph? *A.* Oh, no, no.

10 *Q.* Did you understand my question?

A. You asked me if that—

Q. If that is a correct representation of the objects as they existed at the time when you took the photograph?

A. Oh, yes, yes.

Q. You say about four days ago—can you be a little more definite as to what day it was—what day was that?

A. It must have been on Monday.

Q. Monday this week? *A.* Yes, sir.

Q. About what time of the day did you take this picture?

20 *A.* That was taken between 10 and 11 o'clock.

Mr. Hardenbrook—Complainant offers the picture in evidence.

Mr. Wall—Objected to by defendant except in so far as it may show the relative location of the pillars, etc., of the interior of the church.

Marked Plff's. Ex. 4, J. H. C., July 12, 1911.

Q. What was the condition of the church as to being free from smoke, or contaminated with smoke at the time you took this photograph which has just been marked in evidence?

30 *A.* Mr. Wall—Objected to by defendant as incompetent.

A. That condition of the church—that is it.

Q. I am talking about the condition of the church the day you took that photograph, as to smoke.

A. The day I took that photograph there was still a fog and smoke there yet.

Q. In what portion? *A.* Right behind the steeple.

Q. When you refer to the steeple you refer to this eminence which appears right in the center of the photograph?

A. Yes, sir; you cannot see it distinct.

40 *Q.* To what extent did the existence of that fog which you have described interfere with the taking of a complete or perfect photograph?

Mr. Wall—Objected to by defendant as incompetent and not the best evidence.

A. It simply interferes that much that it don't appear sharp.

Q. In what respect does it not appear sharp?

A. If there was no fog right behind the steeple you could see the windows just the same as you see them here (indicating).

Q. When you say the windows you refer to the religious figures and characters upon the windows which do appear in the two side windows, but do not appear in the back window?

A. Yes, sir.

10

Q. I show you another photograph and ask you to state what that is.

A. That is a photograph that was taken at the same time that one was taken.

Q. At the same time as Ex. No. 4?

A. Yes, sir; it was taken from the roof of the convent next to the rectory.

Q. Rectory of St. Anthony's Church? *A.* Yes.

Q. And that is a photograph of what?

A. Of the locomotives; one line of cars and locomotive behind 20 two line of freight cars.

Q. Of what railroad?

A. The Pennsylvania Railroad on Sixth street.

Q. About what time of the day did you take this?

A. That was taken between the hours of—it was nearly 11 o'clock.

Q. On Monday last? *A.* Yes, sir.

Q. And how far distant—you personally took this photograph?

A. Yes, sir.

Q. And how far distant was your camera from this locomotive engine? *A.* About 150 feet.

Q. You caused the negative to be developed? *A.* Yes, sir.

Q. And this is the photograph printed from the negative?

A. Yes, sir.

Q. By you. *A.* Yes, sir.

Q. Is this photograph a correct representation of the objects as they appeared at the time this photograph was taken? *A.* Yes, sir.

Q. From the negative taken? *A.* Yes, sir.

Q. I call your attention to a certain blur about the center of 40 this photograph and ask you what that is?

A. That is smoke out of the engine.

Q. The engine which you have just testified to? *A.* Yes, sir.

Mr. Hardenbrook—Photograph offered in evidence.

Mr. Wall—Objected to be defendant as incompetent, as not the best evidence, as not evidential of any of the issues in the case in that it was not taken during the times complained of,

Marked Plaintiff's Ex. 5, J. H. C. July 12, 1911.

CROSS-EXAMINATION, by Mr. WALL:

Q. Has your name always been Davis? A. Yes, sir.

10 Q. Lived in Jersey City all your life? A. No, sir.

Q. Where did you live before then?

A. I have lived here for the last 21 years.

Q. Where did you live before that? A. New York.

Q. Were you a photographer in New York? A. No, sir.

Q. You were never a photographer in New York? A. Oh, yes.

Q. You were? A. Yes, sir.

Q. Have you got your own shop? A. I got my own shop, yes.

Q. In whose employ are you? A. Myself.

20 Q. Have you been employed by the Law Department of Jersey City? A. Yes, sir.

Q. Are you under a regular retainer by them? A. No, sir.

Q. Employed by them on all these smoke cases?

A. In all cases of any kind—real estate, taxes, or anything at all; whenever they want me I am on the job.

Q. Now, when you went to the church in 1908, did you go there on your own motion, or were you asked by anybody to go there? A. Go there on my own motion.

30 Q. How do you do, take these interiors of pictures with flashlight? A. Yes, sir.

Q. Is this picture of the interior of the church taken by flashlight? A. Yes, sir.

Q. Where did you say the fog was in that picture?

A. Right in front, way up.

Q. In the chancel? A. It is right over the altar.

Q. And how long were you in the interior of the church that time, when you took this picture? A. About fifteen minutes.

Q. And did you wait for the fog to come there, or did you wait for the fog to go away?

40 Q. A. No, sir, that fog is there.

Q. All the time? Is it there all the time?

A. Every time I go to take a picture there.

Q. Do you mean to say that for the fifteen minutes you were in the church it hung in the chancel all the time?

A. Yes, sir.

Q. Hung out there like a tin sign, eh? A. It couldn't go out.

Q. During those fifteen minutes, I am asking you what did it do, it hung there steadily like a tin sign, did it? A. Yes, sir.

Q. And you came there to take a picture under the instructions of Father Kwiatkowski? A. No, sir.

Q. What made you go there this time?

A. I was told if I had any photographs of Sixth street there— 10

Q. Told by whom? A. By Mr. Hike.

Q. The corporation counsel of Jersey City? A. Yes, sir.

Q. And then on the instructions of the corporation counsel of Jersey City you went there and took the picture? A. No, not on his instructions.

Q. On whose instructions?

A. Nobody gave me the instructions to go up there.

Q. Nobody gave you the instructions? A. No, sir.

Q. Just went of your own accord? A. They wanted photographs of it. 20

Q. I am asking you who told you to go there? A. Nobody.

Q. Now, what did you do when you first got in there?

A. Got in where?

Q. In the interior of the church?

A. I took the exterior of Sixth street first, and then I took my camera, went around the corner, went into the church, put my camera down at the entrance of the church, on the inside of the church I mean, and focussed on the interior of the church, took my lamp, filled it, put the slide in, put the holder in, took my cap off and blew the flash, and that is the picture. 30

Q. How was the wind blowing that day? A. Everything was closed up.

Q. Were the windows of the church closed?

A. Yes, sir; otherwise, I couldn't blow my flash.

Q. They were all closed? A. Yes, sir.

Q. Did you close them? A. No, sir.

Q. There was nothing open to the outside air?

A. No, sir, any window I see open I close myself.

Q. You closed the windows?

A. If I had seen any open I would have closed them. 40

Q. You didn't close any windows? A. No, sir.

Q. And you say all the windows were closed?

A. To my knowledge, what I looked around.

Q. You made an examination?

A. No, sir; I held my lamp up, just held my lamp, and I look around to see if there is any windows open, so I don't get any draft.

Q. You did look around to see whether there was any windows open? *A.* Yes, sir.

Q. And you didn't see any windows open anywhere? *A.* No, sir.

Q. How far is it from the place where your camera was placed
10 to the end of the chancel of the church?

A. I should think it is about 100 feet; about 75 feet anyway.

Q. Is this a poor picture or a good picture? *A.* That is a good one.

Q. As a flashlight that is a pretty good picture? *A.* Yes, sir.

Q. And the thing that determines whether a picture is good or not is what you call register? *A.* I don't know what that means.

Q. You don't know what register means? *A.* How do you mean?

Q. You don't recognize that as a phrase which has to do with photography? *A.* In what way.

Q. In any way.

A. I consider it as good as can be taken.

Q. You don't consider that the register of the picture has anything to do with the picture? *A.* No.

Q. You don't understand what that means? *A.* No, I don't.

Q. What constitutes a good picture of an interior?

A. To focus it sharp and throw your light properly.

Q. That is in the taking of it, but you tell whether a picture
30 is a good picture by whether it shows the things up sharply or not?

A. Yes, sir, that is what I say by focussing it sharp.

Q. Now, I notice the photograph here on the right hand side of the chancel, what is that a figure of in that window?

A. What kind of a figure?

Q. What is it?

A. It is no figure at all; you mean a spot of some kind?

Q. Don't you understand what a figure is?

A. I don't know what you mean.

Q. That is an illuminated window, a colored window?

A. Yes, sir.

Q. That window to the right of the chancel? *A.* Yes, sir.

Q. And that shows the figure of a person, doesn't it?

A. I never took notice whether there was a person on there or not.

Q. Look at the photograph and see whether there is a person there or not?

A. Why yes, there is; I think there is.

Q. It shows it clearly, doesn't it? *A.* No, oh, no.

Q. It doesn't? *A.* That could be made still clearer if the back of that altar was clearer.

Q. Have you got a glass with you? *A.* No, sir.

Q. Magnifying glass? *A.* No, sir.

10

Q. Look at the crucifix on the steeple?

A. You can't see nothing there.

Q. Can't you see the crucifix and Christ on the cross, in that crucifix? *A.* No, sir.

Q. You can't? *A.* No, sir.

Q. Can you see the figures at the base of the cross?

Mr. Hardenbrook—Objected to by complainant.

A. No, sir, I can't; you mean on the window?

Q. No, I mean at the base of the steeple?

A. Yes; this part you can see; you can see everything on this 20 part.

Q. That is as far away as the window?

A. It is about six inches, I guess.

Q. In other words, you say six inches nearer to the camera than the window was? *A.* Yes, sir.

Q. And those figures are very small figures, aren't they?

A. Which figures?

Q. The figures at the base of the cross? *A.* Yes, sir.

Q. How high are they, do you suppose, in the church?

A. That I couldn't say.

80

Q. About six inches high, estimate it? *A.* More than that.

Q. Those little figures at the bars of the cross, how high are they as painted there—if you went up and measured the amount of space that they take up, how high would those figures be?

A. I really could not tell you; I never took any interest to measure them or how high they would be.

Q. Now, that is a dark background where those little figures are? *A.* Yes, sir.

Q. And it takes a pretty good picture to show those against 40 a dark background like that?

A. Well, yes, but if the images were lighter it would show still clearer.

Q. Now, coming back to the window on the right of the steeple, as you call it, the light comes through the illuminated glass in that window, doesn't it? *A.* Yes, sir.

Q. Well, isn't that a pretty difficult thing to take a fair picture of, an illuminated window with the light coming toward the camera?

A. Not in a flash, I kill all the sun in a flash.

Q. What do you mean by that?

10 *A.* Well, if you stood in this church here and all the sun turned on you and I blow the flash you wouldn't see the sun,

Q. You did see the sun in that illuminated window, don't you?

A. It is not the sun; the light is not strong enough for that distance; it is fog; if there wasn't fog there you could see it just as clear there as the bottom; you seen the bottom of the windows where there is no smoke, you take notice you see it clearly, but the further up you go the less you see of the picture. Now, if the light injured the picture the whole windows would be all blurred.

Q. If what?

20 *A.* If the light would injure that picture, by a flash; now, if that was taken by daylight, you couldn't see as much of the windows as you do now.

Q. When was this taken, at night?

A. No, sir; it was taken somewhere around eleven o'clock.

Q. In the morning? *A.* Yes.

Q. What is the thing that makes those windows near the steeple look white, is it sunlight? *A.* No, sir.

Q. There was no sunlight shining through them?

A. That I can't say.

30 *Q.* What is it makes them look white?

A. The fog that is there; does not give me a chance to get the figures.

Q. The fog makes the windows look white, and not the sunlight coming through the window?

A. The sunlight wouldn't bother any flashlight.

Q. Did the sunlight come through the windows when you took that picture? *A.* Could not tell you that.

Q. Aren't you a little short on your estimate of 75 feet?

A. I may be at that.

40 *Q.* Would it surprise you to hear that that church is 150 feet deep? *A.* I don't think it is that distance.

Q. How near to the door was your camera? *A.* About seven feet.

Q. That is from the front door? *A.* Yes, sir.

Q. Then you practically took the whole aisle of the church with the chancel beyond? *A.* Yes, sir.

Q. Look again, and see whether that white light in those three windows near the steeple, as you call it, was made by sunlight or not. *A.* That I do not know.

Q. Do you mean to say as a photographer that you cannot say whether that white light is made by sunlight?

A. Daylight might make that white light.

Q. Don't you know what makes daylight? *A.* Yes, sun makes 10 daylight.

Q. Well, then, the sun makes that white light? *A.* No, I can't say that.

Q. Daylight makes that white light? *A.* It may make it.

Q. Did it make it

A. I can't say whether the sun was thrown on them windows or not; I don't know.

Q. Now, there were two kinds of light in that church when you were taking that picture—there was the light from your flash and the light from the sunlight? 20

A. I don't know whether it was sun or not.

Q. Well, daylight? *A.* Daylight, yes.

Q. And sun makes daylight? *A.* Well—

Q. Do you know anything else makes daylight besides the sun? *A.* If I blow my flash that makes light.

Q. Does that make daylight? *A.* No.

Q. Tell me the kind of light that makes daylight except sunlight?

A. We don't have to have sun to take photographs; it can be cloudy and I can take photographs; and you can get the light through those windows just as well as if the sun was hitting there. 30

Q. Do you still say that you don't know whether that white light or those windows was made by sunlight? *A.* No, sir.

Q. You don't know? *A.* No, sir.

Q. You don't know what light made those windows white like that? *A.* It was some light, it was daylight.

Q. And you say sun makes daylight? *A.* No, I don't say that.

Q. What kind of light makes daylight? *A.* Ordinary light.

Q. Now, think it over?

A. I have thought it over for 25 years.

Q. And the result of your twenty-five years' study is that you

don't know whether the light in those three windows near the steeple there is sunlight or not? *A.* No, sir.

Q. You cannot draw the distinction between daylight and sun-light? *A.* No, sir, not in this picture.

Q. You say the light in those three windows is daylight? *A.* Yes, sir.

Q. What kind of a day was it you took those pictures?

A. Nice day.

Q. What do you mean by that? *A.* Clear day.

10 *Q.* And the pictures were taken on the 10th of July?

A. It was on a Monday.

Q. Last Monday? *A.* Last Monday.

Q. Now take the second picture, the one marked Ex. 5, that is not smoke on the right-hand side of the picture which makes it faint, is it? *A.* Yes, sir.

Q. Isn't that picture light struck, as they call it?

A. No, sir; will you let me explain? Standing on the top of the roof of the convent, next door to the rectory of the complainant; I had my camera on the roof and waiting for trains and

20 coming and going; there is one coming and one going, and as—the breeze was blowing, and as I took the cap of the camera off to take one going, the smoke blew right in front of the camera, and I just had time to put the cap on.

Q. You were watching for smoke?

A. When the trains were going by I went upstairs on the roof.

Q. Were you watching for smoke? *A.* No, I wasn't watching for any.

Q. You were trying to get as clear a picture as possible?

30 *A.* I went up there to get a picture of the railroad.

Q. To show the smoke? *A.* To show the smoke.

Q. You wanted to get as much smoke as possible? *A.* No.

Q. How many pictures did you take? *A.* Just two.

Q. One picture of the interior, and this one of the exterior?

A. Yes.

Q. And how long did you wait on top of the roof until you got this picture of the railroad? *A.* About five minutes.

Q. Why didn't you take a picture just as soon as you got up there?

40 *A.* I am speaking of the time I got on the roof and set my camera; and just as I did it there was a train coming along, and I said, "I will get this one," and while I shoved my holder in there was another train coming the other way, and the breeze

blew the smoke right over towards the rectory and I put my cap on and took one quick.

Q. That does not look very dark, it looks very light on the right-hand side of the picture—that indistinctness which you call smoke?

A. That is the smoke which came right in front of the lens.

Q. That wasn't white smoke? A. It was black.

Q. Was it black?

A. It surely was, the same as this (indicating), but by the time the wind blows it away it don't remain black. 10

Q. It remains white? A. It turns light.

Q. Was there any steam from the engine? A. That I really couldn't tell you.

Q. Would steam show in your plate? A. It surely would.

Q. How would it show? A. White.

Q. Like this on the right-hand side of the plate? A. No.

Q. How different from that?

A. It would just show plain white, same as you are blowing from your cigar.

Q. That is smoke? A. Well, that is the way it would show, 20 the color of that.

Q. It would be possible for you to take a photograph showing like that if there was no smoke on the right-hand side—even if there were not any smoke there?

A. Oh, no; no, sir; that side would have to show the same as this one; when the smoke came toward the camera on that side I put my cap on quick.

Q. Isn't it very easy to make a plate indistinct? A. Indistinct?

Q. You understand what indistinct is? 30

A. Yes, providing you don't focus it right, but you can easily judge the plate whether it is focussed right or not, and as long as it is focussed, the surroundings have got to show if it is clear.

Q. Would you be able to focus a plate so it would show one-half plain and one-half indistinct? A. No, sir.

Q. It has got to be all clear or indistinct?

A. Anything in front of the lens takes.

Q. Isn't it a very easy thing to doctor a plate so that it would be indistinct?

A. Yes, you can do a whole lot of things with a plate; and I can bring that plate to you and show that it was not doctored, and when a plate is doctored it is easily seen; you don't have to have any expert photographers to see it either, because it has 10

got to be doctored on the film and it has got to be done with lead pencil making it light or dark or putting shades or shadows on.

Q. You can't rub it off?

A. You can't wash it off, the plate, and you can easily see the difference from the plate, the picture; you can easily see the pencil mark, or if the plate is retouched, and if it is washed off you can see the difference in the picture right away.

Q. In what direction was this train going, toward the river,
10 or toward Philadelphia? *A.* It was going out.

Q. Toward Philadelphia?

A. Going out, I don't know where it was going.

Q. Toward Newark? *A.* Toward Newark, yes.

Q. And which is the Newark end of the picture, the indistinct end or the clear end?

A. The clear end of the picture is the Newark end.

Q. None of the smoke from that engine had actually gotten over to the place where you were at the time you took the picture?

20 *A.* Oh, yes; that is the reason you got the fog on it there; otherwise, that plate would not have been fogged; you see, as the train is going out to Newark and the smoke is issuing it comes back; the train is going away and the smoke comes back, and the wind drove it over on me, and I put my cap on quick to get the picture, so that side where the smoke is on, that was taken and the clear side was taken.

Q. You didn't notice whether any steam was coming from the engine or not? *A.* No, sir, I didn't.

Q. Steam would make fog just the same as smoke?

30 *A.* No, sir, there is not enough steam out of an engine to carry that distance to fog it.

Q. How far away was the train from where you were?

A. One hundred and fifty feet.

Q. Half a block?

A. About that. There are two or three line of cars there, that is, in front of it, and they were running right behind; it may have been on the last track, I don't know.

W. PUTKOWSKI, called by the complainant, being duly
40 sworn, testified as follows:

DIRECT EXAMINATION, By Mr. HARDENBROOK:

Q. Where do you live?

A. 40 Newark avenue; that is my place of business.

Q. What is your business? *A.* Photographer.

Q. How long have you been a photographer? *A.* Since 1897; fourteen years.

Q. Where? *A.* I am five years in this country.

Q. Your home was in Poland? *A.* Yes, sir.

Q. Did you, on the 9th day of July, 1911, between the hours of eleven o'clock and three, take certain photographs of the engines and trains of the Pennsylvania railroad on the viaduct adjoining Sixth street in Jersey City? *A.* Yes, sir.

Q. And from what point or place did you take these photographs? 10

A. I took from two points; there are two kinds of pictures; one I took from the steeple of the church, on top of the church.

Q. From where?

A. From the steeple; I took two pictures; I directed my camera down to the ferry, down to the depot, the station of the railroad.

Q. You took two pictures facing east?

A. Yes, and the rest I took from the windows of the Father's residence. 20

Q. The others you took from the windows of the residence, the rectory connected with St. Anthony's Church? *A.* Yes, sir.

Q. Which is immediately opposite the railroad? *A.* Opposite the railroad.

Q. With the street intervening? *A.* Yes.

Q. And at whose request did you make these photographs?

A. Father Kwiatkowski.

Q. And he is the officiating priest in charge of St. Anthony's Church? *A.* Yes, sir.

Q. I show you what purports to be a photograph of the railroad on which there is written July 9, 1911, at 11 A. M., and ask you if that date and that hour refer to the date and the hour at which this photograph was taken? *A.* That is the right time. 30

Q. You personally took the negative of this picture to which I call your attention? *A.* Yes, I took it personally.

Q. And developed the negative? *A.* Myself.

Q. Into the photograph which I now show you? *A.* Yes, sir.

Q. Is that a correct representation of the objects which it purports to show as they existed at the time the photograph was taken? 40

A. That is a snapshot of one-fifteenth of a second.

Mr. Hardenbrook—Picture offered in evidence by complainant.

Mr. Wall—Objected to by defendant on the ground that it is not the best evidence, and incompetent.

Marked Plff's Ex. 6, J. H. C. July 12, 1911.

Q. This photograph which has just been marked Ex. 6 was taken from what point, where was your camera when you took that? A. On the steeple of the church.

Q. About how far distant from the lines of cars which appear 19 in this photograph, about how far?

A. From the lines of cars, it was about seventy feet on a direct line.

Q. I call your attention to a dark object in the sky on the left-hand side, the upper left-hand corner of this photograph Ex. 6. What is that? A. That is the smoke from two engines.

Q. What engines are they? A. I don't understand that question.

Q. You say engines—engines of what? A. Railroad engines.

Q. What railroad?

20 A. It is on Sixth street; the Pennsylvania railroad.

Q. I call your attention to another photograph dated the same day on which there is a written memorandum, 11.05, A. M., and ask you the same question in relation to this photograph and ask if your answers are the same?

Mr. Wall—Same objection as before by defendant, but no objection as to form of question.

Q. Your answers are the same regarding this photograph?

A. Yes, sir, the same.

Q. Where was your camera located when you took this photo- 30 graph? A. Same point as the first one.

Q. I call your attention to a dark color immediately to the right of the center of the picture, and ask you what that is?

A. That is the smoke; the smoke when you see it on a dark background is slightly blue in color and it come out on a plate light, not as dark as it should be.

Q. That is smoke from the engine of the Pennsylvania railroad? A. Yes, sir.

Mr. Hardenbrook—Picture offered in evidence by complainant.

40 Mr. Wall—Objected to by defendant as before.

Marked Plff's Ex. 7, J. H. C. July 12, 1911.

Q. I ask you the same questions with reference to photograph

with the memorandum 12.05 P. M. and ask you if your answers are the same in reference to those questions? *A.* Yes, the same.

Q. It was taken by you, developed by you, and is a correct representation? *A.* Yes, sir.

Q. Now, where was this taken from? *A.* From Father Kwiatkowski's residence.

Q. Window of what floor? *A.* The third floor; top floor anyway.

Q. And what is that dark object which appears there?

A. That is a snapshot of the smoke.

10

Q. From engine of the Pennsylvania railroad? *A.* Yes, sir.

Offered in evidence by complainant.

Mr. Wall—Same objection by defendant.

Marked Plff's Ex. 8, J. H. C. July 12, 1911.

Q. I call your attention to photograph bearing the same date marked 2.20 P. M., and I ask you the same questions as to taking and developing of this? *A.* The same answers.

Q. And this photograph marked 2.20 P. M., where was that taken from? *A.* The same window.

Q. As Exhibit 8? *A.* Yes, sir.

20

Q. And that dark object is also smoke from an engine of the Pennsylvania railroad? *A.* Yes, sir.

Offered in evidence by the complainant.

Mr. Wall—Same objection by defendant.

Marked Plff's Ex. 9, J. H. C. July 12, 1911.

Q. I ask you the same questions in regard to a photograph dated the same date, memoranda 2.35 P. M., and ask you if your answers in relation to taking and developing this is the same as to the others? *A.* The same.

Q. Where was that taken from? *A.* The same window.

30

Q. And this dark color here is smoke from an engine of the Pennsylvania Railroad Company? *A.* Yes, sir.

Offered in evidence by complainant.

Mr. Wall—Same objection by defendant.

Marked Plff's Ex. 10, J. H. C. July 12, 1911.

Counsel for complainant agrees that if counsel for the railroad desires to elaborate upon these objections later it may be done with the same force and effect as at the introduction of the evidence.

Q. I ask you the same questions relative to photograph dated the same day, with a memorandum on or of 3 P. M., and ask if your answers in relation to this photograph are the same as in relation to the others? *A.* The same.

Q. What window was this taken from? *A.* Same window.

Q. This which we see on the right-hand corner is smoke emitted from the engines of the Pennsylvania Railroad Company? *A.* Yes, sir.

Offered in evidence by complainant.

Same objection by defendant.

Marked Plff's Ex. 11, J. H. C. July 12, 1911.

CROSS-EXAMINATION, by Mr. WALL:

10 *Q.* I notice that Exhibits 11, 10, 9 and 8 show the embankment, that is, the stone work of the Pennsylvania railroad elevation, as very black? *A.* Yes, sir.

Q. Why is that? Because it was taken snapshot against the light.

Q. And that makes everything black? *A.* It is under-exposed.

Q. And everything, therefore, in the picture shows extremely black?

A. That is the reason, because it is a quick snapshot.

20 *Q.* Now, then, if you desired to get things so they wouldn't be so black, how would you expose? *A.* I would expose longer, about one second.

Q. That would make them show lighter? *A.* Yes.

Q. Were all these pictures that were taken under-exposed?

A. No, not all.

Q. Pick out the ones that were not under-exposed?

A. These two were right exposition (witness selects Exhibits 6 and 7).

Q. Referring to Exhibits 6 and 7, you say those were taken with the correct exposure? *A.* Yes; they show light enough.

30 *Q.* I show you Exhibit 6, is there any steam in that smoke?

A. No, steam shows white; here is steam in the center of the picture; that is steam, you see it white; you can see the difference.

Q. You say there is no steam mixed in with the smoke?

A. No, no steam takes dark.

Q. Now, I notice all these pictures are very clear, very sharp, that is correct? *A.* Yes.

Q. So any smoke that you show in any of these pictures bothered you in taking the pictures? *A.* Bothered me?

40 *Q.* Yes. *A.* No—blowing against my camera.

Q. None of this smoke that is shown here in these pictures came over to the church at all?

A. It came up; I didn't wait until it came.

Q. You didn't see it come?

A. You see in the picture, it blows that way.

Q. Do you understand the question, answer it.

A. I did not look at that; that was not my object in going there.

Q. Did you notice how the wind was blowing?

A. I was looking at the smoke, that is all.

Q. You didn't notice how the wind was blowing?

A. I didn't look at that; it was not my business.

Q. Did you notice it—how the wind was blowing when you took these pictures that have been put in evidence here to-day?

A. I could not tell.

Q. Did you notice that? *A.* I can't tell that.

Q. You don't know whether you noticed it or not?

A. I don't know; I didn't care about that.

Q. Are you a member of this church of St. Anthony of Padua?

A. Yes, sir.

Mr. Hardenbrook—Complainant offers in evidence certified copies of the articles of incorporation of the Roman Catholic Church of St. Anthony of Padua, recorded with the clerk of the county of Hudson, December 17, 1884.

Marked Plff's Ex. 16, J. H. C. July 19, 1911.

Also, certified copy of deed from Dennis McLaughlin and others to the Roman Catholic Church of St. Anthony of Padua, dated April 8, 1902, recorded in the office of the register of deeds of Hudson county, New Jersey, on the 14th day of August, 1902, at 9.05 A. M. in Liber 817 of Deeds, page 263. Block 30 1091.

Marked Plff's Ex. 17, J. C. H. July 19, 1911.

Also, certified copy of deed from Dennis McLaughlin and another to the Roman Catholic Church of St. Anthony of Padua, dated May 10, 1893, recorded in the office of the register of Hudson county on the 23d of May, 1893, at 9 A. M., Liber 577 of deeds, page 89.

Marked Plff's Ex. 18, J. H. C. July 19, 1911.

Also, certified copy of deed from Frank J. Matthews 40 and another to the Roman Catholic Church of St. Anthony of Padua, dated June 11, 1898, and recorded

in the office of the register of Hudson county, August 31, 1900, at 3.15 P. M., in Liber 755 of deeds, at page 427.

Marked Plff's Ex. 19, J. H. C. July 19, 1911.

REV. BOOSLAW KWIATKOWSKI, called as a witness by the complainant, being duly sworn according to law, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK :

10 Q. You are connected with the complainant in this action, the Roman Catholic Church of St. Anthony of Padua?

A. I am the rector of this church.

Q. The officiating priest? A. Since 1895.

Q. What is your title in connection with the church?

A. I am the pastor of the church.

Q. And that means, to a layman, that you are the head of the church? A. Head of this parish.

Q. And have been for how many years? A. Since 1895.

Q. And are today? A. Yes.

20 Q. The church is located next door to the corner of Sixth street on Monmouth street, is it not? A. Yes.

Q. The church is how wide, about, the church building?

A. 75 feet by 150 feet.

Q. 150 feet in depth? A. Yes.

Q. I show you a photograph which has been interposed in evidence and marked Plaintiff's Ex. 4, and ask you if that is a fair representation of the interior of the church?

Mr. Wall—Objected to by defendant as incompetent.

A. It is the interior of my church.

30 Q. What kind of a building is there on the corner of Sixth street and Monmouth?

A. There is a four-story brick building, 25 feet wide—on one lot.

Q. 25 feet front on Monmouth street? A. Yes.

Q. Extending to the corner of Sixth street? A. Yes.

Q. And along Sixth street how far?

A. About 45 feet, I guess.

Q. And in the immediate rear of the four-story building on the corner there is a vacant yard connected with the corner building, is that right? A. Yes.

40 Q. Looking across this vacant open yard in the rear of the building on the corner of Sixth street, which you have testified to, what is the first object you see?

A. The church, the side of the church.

Q. What windows are there in the church immediately facing this open space?

A. There is three windows and almost one more.

Q. You mean three full windows and a portion of another?

A. Three whole windows and portion of the fourth

Q. Those windows are about what size, Father, in height and width? *A.* Over 30 feet.

Q. In height? *A.* Yes.

Q. About how wide? *A.* Seven feet; six or seven feet. 10

Q. And those windows open immediately into the church?

A. Yes.

Q. Running along Sixth street, adjoining this vacant yard, is what is known as your rectory?

A. My residence is there, my house.

Q. That is a four-story and basement brick building?

A. Three-story and basement brick building, 50 feet.

Q. 50 feet front? *A.* 50 feet front.

Q. Then running further along Sixth street, up to the corner of Brunswick street on the next corner, is a school, isn't there, 20 connected with your church? *A.* Yes.

Q. And that school building is about how many feet front on Sixth street? *A.* 100 feet.

Q. And about how many feet on Brunswick street?

A. 100 feet.

Q. 100 feet square? *A.* Yes, sir.

Q. How many stories high is that school building?

A. That is four stories.

Q. That school building and that rectory and the church which you have just testified to have been in their present location during the entire time that you have been officiating in connection with the church? *A.* Yes. 30

Q. About how many parishioners have you, members of the church?

A. Well, communicants. there is 8,000 communicants; that is, grown people.

Q. I am talking about the church, the children, about how many people attend your church, regular members of your church? *A.* More than 10,000, anyway.

Q. In the church? *A.* Yes.

Q. Has that been a fair number of the estimate during the entire time that you have been in charge there, or has it increased or decreased?

A. It is increasing; it is increasing.

Q. About what was the number when you went there and took charge?

A. I guess between six and seven thousand when I came there.

Q. Communicants? *A.* Altogether.

Q. And when you first came there how many children were there connected with the school?

A. When I came there, there was around 100 children in the school.

10 *Q.* When you first went there? *A.* Yes.

Q. And about how many nuns or teachers connected with the school when you went there?

A. There were two lay teachers when I came.

Q. About how many scholars are there now?

A. There is around 1,200.

Q. And how many teachers have you there now?

A. I have nineteen teachers.

Q. And who else is there connected with the school, aside from the teachers, are there any nuns?

20 *A.* Nuns? Nineteen sisters, and me and my assistant.

Q. You speak of nineteen teachers, are these nineteen sisters separate and distinct from the teachers, or are these nineteen sisters the teachers? *A.* They are the teachers.

Q. You don't mean twice nineteen? *A.* No.

Q. You are familiar with the location of the Pennsylvania Railroad? *A.* Yes.

Q. It is situated on what might be called the south side of Sixth street, immediately opposite the school and the rectory?

A. It is.

30 *Q.* There is the width of the street between the rectory and school, and the viaduct upon which the railroad is built and running—there is the distance of the street?

A. About 56 feet, or 58 feet from the wall.

Q. It is about 56 feet from the wall of the viaduct?

A. More or less, I couldn't tell exactly, from my rectory to the wall of the Pennsylvania Railroad, which is opposite my house.

Q. Have you measured that or caused it to be measured?

A. I measured that.

Q. And your measurement is substantially accurate, isn't it?

40 *A.* Yes; I guess it was 58 feet, if I remember exactly.

Q. Have you observed the number of tracks which is on the top of this viaduct, this stone viaduct?

A. It is a stone viaduct.

Q. Have you noticed from the windows of your rectory or elsewhere, the number of tracks on it?

A. Yes, I counted it myself; it is six or seven; it is not very easy counting them.

Q. Running westward from your rectory, which is in the middle of the block between Monmouth and Brunswick streets, there are a number of switches, are there not, connected with the railroad? *A.* Yes, there are many switches.

Q. About when were those switches constructed so far as you can remember?

A. I know that they were put on when they built this stone wall or bridge; since that time they make the switches there.

Q. About what year—about how long ago?

A. I don't remember now what year.

Q. About what year—about how long ago?

A. About seven years, or eight.

Q. Where are these switches located with reference to Brunswick street, which is the corner on which the school stands?

A. Opposite the school; opposite the house and the church, too.

Q. The switches? *A.* Yes.

Q. There are switches extending along the entire block from Brunswick to Monmouth street?

A. Yes, they switch trains all the time there.

Q. Have the number of those switches been increasing so far as you know in the last few years, or don't you know that?

A. I don't know that; I know before they built that stone wall they had only two tracks, as well as I can remember.

Q. Since the stone viaduct was put up they have increased it to six tracks?

A. Yes, more like a station.

30

Q. What have you noticed, if anything, as to the kind and character of coal which is in the tenders connected with the locomotives?

Mr. Wall—Objected to by defendant on the ground that he is not qualified to testify, incompetent to testify as to this.

A. I know the difference between hard and soft coal, and I see on the engines and the tenders, I see soft coal myself, from the windows of my house.

Q. Describe the general appearance of this coal which you call soft coal.

40

A. Soft coal comes in big pieces, and dust between them, and sometimes different sizes, not all one size, and all mixed together.

Q. What is the color of it?

A. The color, I would say, black.

Q. And what have you noticed in the past six years, Father, in the operation of those trains as to the emission of smoke, speaking of the trains themselves, what have you noticed in relation to the emission of smoke?

A. That is a very long confession now; I would like to divide that for smoke and noise.

Q. I asked you as to smoke; what have you observed as to
10 smoke?

A. We have plenty, almost always, plenty of smoke, into the house, into the church, and in the schoolhouse, not only in the days, but also in the nights. We cannot open the windows of the school or house or church on account of that black smoke, which interferes with everybody in the house and in the buildings.

Q. Have you noticed from where this smoke comes?

A. Right from the Pennsylvania Railroad tracks.

Q. The engines? A. Yes, the engines.

Q. What is the general color of that smoke which you have
20 seen emitted from these engines?

A. Always black; sometimes less, sometimes more.

Q. And when did you first notice that, when you first went there as officiating priest connected with the church?

A. Well, I see that from the beginning I come to Jersey City.

Q. Now what would you say as to whether or not since the time you first went there, down to the present time, there has been any increase in the quantity of that smoke—have you noticed whether there has been any noticeable increase in the number of trains?

30 A. There is always more amount of smoke in the buildings; if they have more trains I don't know that; I see in the past six or seven years a great amount of trains; if I could judge there is more than sixty trains a day.

Q. I call your attention to what has been marked as Ex. 6, and ask you to look at this exhibit, and state how the conditions existing in the past six years compare with the conditions as appear in that exhibit—how do the conditions which have existed compare with that exhibit?

A. They have had always there some smoke; sometimes more black than this here; there is noise, too.

Q. Have you frequently seen the conditions existing as appear in this exhibit? A. Every day I see it.

Q. I ask you the same questions as to what has been marked Exhibit 7, have you seen those conditions as appear there?

A. This is a standing train in front of my house.

Q. I ask you, have you seen the conditions in the past six years existing as they appear to exist in that Exhibit 7? *A.* Yes.

Q. Frequently? *A.* Yes.

Q. I ask you the same questions as to what has been marked Exhibit 8?

Mr. Wall—Objected to by defendant on the ground that this exhibit has not been properly proved, and is 10 discredited by the testimony of the photographer who took it as not being the best evidence because of the fact that he testified it was under-exposed and was black by reason thereof. I do not object on the ground that counsel puts his question in comprehensive form referring to the previous questions.

A. I see that every day.

Q. And have for the past— *A.* Seven years.

Q. I ask you the same questions, Father, in relation to what has been marked Exhibit 9? 20

Mr. Wall—Same objection by defendant.

A. I see this same all the time.

Q. I ask you the same questions as to Exhibit 10?

Mr. Wall—Same objection by defendant.

A. I see the same thing, days and nights for the past seven or eight years.

Q. I ask you the same questions as to what has been marked Exhibit 11?

Mr. Wall—Same objection by defendant.

A. I see it all the time, every day for the past seven years. 30

Q. How frequently in 24 hours have you observed the conditions as they appear to exist in these various photographs which I have shown you?

A. There is not one hour in the 24, I think, that we have not got this smoke.

Q. As appears in those exhibits?

A. Yes, as appears in those exhibits.

Q. And that is true of night as well as day?

A. Night and day.

Q. And that condition has existed back for how long?

A. About seven years.

Q. What have you noticed in connection with the emission of

this smoke which you have testified to in reference to the school buildings?

A. That smoke makes dust and dirt in the school so the children they spoil their dresses; the furniture of the school, the pulpits and desks and maps; and on very many occasions if the windows the smoke comes into the school so the lecture is discolored and dirty from this smoke, but all the paint inside of the school in almost every room, and besides that the same damage is done by this smoke in the Sister House, which is 10 connected right with the school. In the school is a nice hall, and the scenery and everything we have there is spoiled and discolored by this smoke.

Q. For what length of time have you noticed that condition in the school? A. For more than ten years.

Q. Have you ever been present in the school when you have noticed the smoke coming from these engines being blown into the schoolroom?

A. Yes; I go every week, at least once a week, I go to the school.

20 Q. How frequently, estimating it, have you noticed the smoke coming from these engines, actually coming into the school?

A. Always when I am there.

Q. The difference in the wind, does that make some difference?

A. Yes, some; if the wind is the other way less smoke comes into the school.

Q. You say less; do you mean to say that when the wind is blowing away from the school, notwithstanding that fact, there is smoke comes into the school?

30 A. No matter how that goes it seems we have got that smoke; the wind not always goes the same way, but in a few minutes you get back this smoke.

Q. Have you observed, speaking now exclusively of the school, have you observed whether this smoke which you have seen coming into the school building carries with it any particles or substance whatever?

A. Black dust comes with this smoke, and settles on all that is inside, on the floor, on the desks and furniture not only, but even the ceilings it spoils; the inside of the building and the outside of the buildings all black now from this smoke.

40 Q. Has that condition existed during the entire time you have testified to?

A. Yes, more than seven years, since I built the school.

Q. Have you at any time collected any of this substance in the schoolroom?

A. I did not collect it myself in the school.

Q. You have made no collection of this material in the school?

A. No; I collected some in the house and some in the church, not in the school.

Q. Have you made a collection of this material in your rectory, your residence? *A.* I did.

Q. And in the church? *A.* And in the church.

Q. Have you those collections which you have made of that material? *A.* Yes.

Q. I show you a substance contained in what has been marked Plff's Ex. 1 for Identification, and ask you whether or not the substance contained in that envelope was collected by you, and if so, from where?

A. Yes; that is from the attic in my house.

Q. On what date did you make the collection of that substance in that envelope?

A. That was two or three days before we started the first examination of testimony here.

Q. I ask you, Father, if you will look at this substance in this envelope Ex. 1 for Identification, and state how the substance which you have noticed in the schoolhouse compares with that?

A. It is the same thing.

Complainant offers in evidence envelope which has been previously marked Plff's Ex. 1 for Iden., containing the written memoranda, "Taken from Attic Space 2 by 6."

Mr. Wall—Objected to by defendant on the ground that it is incompetent and no proper foundation has been laid for introducing it into evidence, and on the further ground that the sample has been discredited by the testimony of previous witnesses.

Marked Plff's Ex. 12, July 12, 1911, J. H. C.

Q. I show you a substance contained in an envelope marked Ex. 3 for Identification, and ask you what that substance is, and from where it was obtained, so far as you know?

A. It was taken from the sills of my church.

Q. Outside? *A.* Inside.

Q. When? *A.* The same day when we came here for the first examination; the first taking of testimony in this matter.

Q. I ask you how the substance which you have seen in the

schoolroom compares in character with the substance contained in this envelope? A. Exactly the same.

Complainant offers said Ex. 3 for Identification in evidence.

Mr. Wall—Same objection by defendant.

Marked Plff's Ex. 13, J. H. C., July 12, 1911.

Q. How frequently during the past six years have you noticed within the schoolroom or school-building the substance such as I have shown you in these two last exhibits?

10 A. You can find that every day.

Q. For how long a period?

A. Since I built my school, seven, eight, ten years—since I built the school, you get the same thing from the railroad.

Q. Have you ever noticed an accumulation of that substance on the roof of the school-building? A. That is on the roof.

Q. Have you ever been on the roof of the school-building?

A. Not on the school; no, I was not there, not myself.

Q. You personally have not been on the roof of the school?

A. No.

20 Q. Now, what have you noticed in the rectory, your residence, as to the smoke from these engines? Go ahead and state in detail what you have noticed in your residence as to smoke only.

A. The smoke comes into my house, my residence, always; and I could not understand how this smoke comes into the places where the windows are closed; for instance, you take the attic, there are three windows there, but they are always closed; I find the smoke there, and dust comes there; very seldom the window is open, always closed, and I can show you here what I bring from the attic myself, and can show you how big damage this 30 smoke and dust makes which comes from the Pennsylvania Railroad, in the house and in all our property there. (Witness produces box.)

Q. These windows in the attic which you have referred to face which way? A. The Pennsylvania Railroad.

Q. And the attic is on what would be the fourth floor?

A. Yes, sir.

Q. That rectory is three stories and attic? A. Yes.

Q. How large are those windows, about?

A. About three feet by four.

40 Q. I show you what has been marked in evidence Plff's Ex. 12 with the inscription on it, "Taken from attic space 2 by 6," that 2 by 6 refers to what? A. The space.

Q. Two feet by six feet? A. Yes, and was taken by me.

Q. I show you a box containing what appears to be various sheets of wall paper, and I show you a strip of wall paper, and ask you if you know where that was taken from?

A. That paper was taken from the attic of my house.

Q. How long had this paper been on the wall?

A. That was not on the wall; that was some which remained over.

Q. Where was this paper in the attic—did you bring this here?

A. Yes, I took that from the attic myself.

Q. Was it on the wall?

10

A. No, it was on the floor of the attic.

Q. A certain portion of this paper appears to be of a bright green color, and certain other portions appear to be very dark and discolored; will you explain, if you know, the cause of the difference in color of certain portions of that paper?

A. The paper was a light green; and after being there in the attic was damaged and discolored with the smoke and dust from the Pennsylvania Railroad; you can now see this part is green and this is black, discolored entirely.

Q. What is the cause, if you know, of certain portions of that paper still being a bright green, and certain other portions of it being very dark?

A. The cause? Dust from the Pennsylvania Railroad engines.

Q. Why is it, if you know, that the entire strip of paper is not discolored, the same as some portions of it?

A. Because this black part was exposed, and the other was rolled up.

Q. This paper which I now show you had been in the attic for how long a time? *A.* About two years.

Q. And when did you take this paper from the attic?

30

A. For the first examination.

Q. The first day of the hearing here before Mr. Beach?

A. Yes, the day before the first hearing.

Complainant offers sheet of paper in evidence.

Mr. Wall—Objected to by defendant as incompetent and without probative force.

Marked Plff's Ex. 14, J. H. C., July 12, 1911.

Q. I show you another strip of what appears to be the same kind of paper, and ask you the same questions which I have asked you heretofore in regard to the last Ex. 14, and what are your answers?

40

A. This was in the same place and is discolored by the same cause, smoke from the Pennsylvania Railroad engines.

Q. When you say smoke, you refer to the dust as well as smoke? *A.* Yes, smoke and dust.

Complainant offers same in evidence.

Mr. Wall—Same objection by defendant.

Marked Plff's Ex. 15, J. H. C., July 12, 1911.

Q. Now, please state what you have observed in reference to smoke and dust on the third floor of your rectory, the floor below the attic?

A. The same smoke and dust coming in through the windows,
10 which damaged the floors,—parquet floor there—walls, ceilings, carpets, and all the furniture there.

Q. Have you any curtains in that floor at the windows?

A. I cannot use any curtains in my house on account of this smoke.

Q. Have you ever attempted to use curtains? *A.* I did.

Q. When?

A. Three years ago I bought some very fine curtains for my windows, and it spoiled them, and I never try to put them up now because they would be spoiled by the smoke and dust anyway.

20 *Q.* When you say they were spoiled, Father, will you please designate what you mean?

A. I mean that this dust and smoke, and this acid—I cannot explain—they are black.

Q. It discolors and blackens them?

A. They are rotten after that.

Q. Became full of holes? *A.* Full of holes.

Q. How long were they up before you noticed this condition in the curtains—how long did you keep them up?

A. Seven or eight months.

30 *Q.* Now, what else have you noticed which has been affected by this smoke and these cinders and substance—on the third floor of your house—have you any pictures?

A. Yes, a few pictures, not very many; all the wall paper and the painting on the walls is spoiled, discolored, black.

Q. Blackened? *A.* Blackened, like this wall paper here.

Q. Do you, or any of your assistants sleep on this third floor?

A. Yes, two assistants; they could not sleep, especially one; he is not here now.

Q. I am asking you as to smoke only; what have you noticed as
40 to the bed clothes and bedding?

A. Yes, besides the furniture and carpets and walls and floor being spoiled, it spoils what is on the beds, pillows and pillow cases, bedding.

Q. How does it affect them, blacken them?

A. Blacking and discoloring them.

Q. I ask you to come down on to the floor below that, the second floor, and ask if substantially the same conditions exist?

A. The same conditions; same damage as above.

Q. The first floor, how about that? *A.* Same conditions.

Q. How about the basement? *A.* Same thing in the basement.

Q. And that condition has existed about how long?

A. Seven or eight years.

Q. Have you noticed whether the articles of provisions or food which have been supplied for your table have been affected in any way by this smoke and dust? 10

A. That belongs to the kitchen; I do not know that.

Q. How about the dining room?

A. My dining room and my office, and every other room, on the floor, on the desk and furniture, table, all, this dust and smoke, dust which comes with the smoke, and I have to keep a special girl to keep cleaning the house; one girl has nothing to do only go over the house every day and clean.

Q. Now, what have you observed in connection with this smoke and cinders, such as you have testified to, in your church? 20

A. In the church it does me very great damage; this dust comes through the windows with the smoke and spoils all the furniture; it discolors and damages it; the dust comes right in on the pews; blackens and discolors the pews, and I have many complaints from the people—

Mr. Wall—Objected to, last statement.

Q. What have you noticed in the church which has been affected? *A.* The organ, pews, altar.

Q. Have you upholstered seats?

A. No; no cushions in the seats; we could not use them.

Q. Carpets in the church? *A.* Carpets, yes; the carpets are discolored, and all in the sacristy discolored, the vestments we use, the linen, the paint in the church, the decorations, altars.

Q. Have you many oil paintings in the church of various religious subjects?

A. I have the Stations; Stations of the Cross.

Q. What is known as the Stations of the Cross?

A. Yes; they are painted; they are made from terra cotta, or something like that, I don't know; they are painted later. 40

Q. They are figures? *A.* Yes, painted in colors.

Q. In terra cotta or some substance, which has been painted?

A. Yes, and the painting is blackened by this dust and smoke.

Q. Take, for instance, your altar?

A. Yes, the linen and the painting blackened.

Q. What paintings around the altar?

A. All altars are painted.

Q. I refer to the paintings on the wall.

A. I don't paint now; I used to paint.

Q. How long a time have you noticed this accumulation of substance in your church? *A.* Every day.

Q. You hold service there what hours?

10 *A.* Every day in the morning, at eight o'clock.

Q. Mass every morning at eight the year around?

A. Every morning; yes.

Q. Sundays?

A. Sundays, from 7.30 to one o'clock the services are in the church, and besides that, vespers every Sunday and holidays, all the month of May and October we have the night services, vespers.

Q. Aside from the service which is continuous throughout the months of May and October, there are certain specified church holidays?

A. Yes, besides this, we have a dozen or twenty.

Q. How many church holidays in the year?

A. 65 to 70, together with Sundays.

Q. That eliminates 52?

A. That is Sundays; aside from that we have around twenty.

Q. About twenty church holidays. *A.* Yes.

Q. On those church holidays what services are conducted?

A. The same as on Sunday.

30 *Q.* Have you at any time that you can recall noticed that smoke which you have spoken of coming from the Pennsylvania Railroad engines into your church at times when you were conducting services? *A.* Yes, many times.

Q. Could you give some idea, within the limit of accuracy, how often that happens—is it on an average of once a month?

A. More.

Q. Once a week?

A. It is on an average of more than that; three or four times in the week.

Q. You consider that to be a fair estimate, speaking exclusively 40 of smoke now? *A.* Yes.

Q. And that condition has existed during the past six or seven years? *A.* Longer than that.

Q. Have you noticed, speaking personally now of yourself, as to whether the smoke collections coming into the church, have had any effect on your voice in any way, has it affected you in any way.

A. Mr. Wall—Objected to by defendant as not an element of damage in this case.

Q. Have you noticed whether it has affected your throat?

A. It has affected it in such a way when the smoke comes into the church—I do not understand that well.

Q. Does it affect your throat or your voice in any way?

A. The smoke is not so dense in the church as to affect my own person, no; I never pay attention to that.

Q. You cannot answer as to others? *A.* No.

Q. Now, what have you noticed in regard to noises coming from this railroad, from the operation of this railroad, during the time you have been officiating in this church?

A. About noises in the school?

Q. In general, what have you noticed as to the noise connected with it?

A. Yes, there is plenty of noise.

Q. Describe what it is.

A. From the engines of the Pennsylvania Railroad, when they pass; big noise from the steam, exhaust steam, bumping of the cars, puffing of the steam, and from the whistles; and when the engines start to go, especially, there is a big noise from the wheels, they turn round and round; it seems to me there is not enough power in the engines to push the cars, and there is a very big noise from this.

Q. Is there any bumping?

A. Bumping, yes; when they bring the cars together; then they switch them right in this block; there are switches there, and they switch those cars all the time; that is a very big noise.

Q. When the wheels pass over the switches? *A.* Yes.

Q. What have you noticed when the smoke is emitted from the smoke stacks, any noise attached to that?

A. Yes, puffing, whistling of the engines, and bells, too.

Q. Ringing of bells? *A.* Yes.

Q. How long has that kind of noise continued, during your entire connection with the church?

A. More than ten years.

Q. Have you noticed whether there is any perceptible increase or decrease in it in the last ten years.

A. I think almost always the same, and seems increasing.

Q. While in the schoolhouse have you ever noticed these noises coming from the operation of the railroad—while in the schoolhouse?

A. Yes, right there in the schoolhouse, interferes with the teachers so they cannot have the lessons with the children; the children could not hear sometimes.

Q. Have you ever been in the school when the teachers had to suspend the exercises owing to this noise? *A.* Yes.

10 *Q.* How frequently has that occurred? *A.* That is every day.

Q. And has so continued for what number of years?

A. The last past ten years.

Q. What have you noticed with reference to these noises in your rectory?

A. Same noise; we could not keep conversation some times; we have to stop; and in the school the sisters have to stop the teaching.

Q. You personally have seen that?

A. Yes, and in the rectory we cannot sleep.

20 *Q.* What portion of the rectory do you sleep in?

A. Right opposite the Pennsylvania Railroad.

Q. On what floor? *A.* Second floor.

Q. Front? *A.* Yes.

Q. What have you noticed in relation to these noises at night?

A. They wake me up some time; I cannot sleep around from 12 to 2 o'clock every night; there is such a noise it is impossible to sleep.

Q. How long has that continued?

A. Past six, or seven, or eight years.

30 *Q.* Have you noticed in relation to these noises, Father, that they are greater or more extensive at any particular hours of the day or night?

A. I do not notice that; I especially know that between 12 and 2 I cannot sleep.

Q. Twelve to two at night? *A.* At night.

Q. Why?

A. Then every train that comes there is that terrible noise.

Q. What terrible noise? *A.* From the engines of the Pennsylvania Railroad.

40 *Q.* What does it consist of, rattling of wheels?

A. Yes, steam, exhaust steam, puffing; I guess that is the worst of all; I could not explain that.

Q. After two o'clock in the morning does the noise grow less?

A. Then I fall asleep; I don't hear it.

Q. How early in the morning have you heard it?

A. From seven o'clock, six o'clock.

Q. And it is continuous throughout the day more or less?

A. Always.

Q. What have you heard in the church in reference to these noises—have you heard them in the church?

A. In the church, yes; sometimes I have to stop my sermon; when I preach to the people I have to stop and wait until the train **10** passes.

Q. How frequently have you had to do that in the past ten years?

A. Once in the month, or more, I have to stop for awhile, say for three or four minutes.

Q. Are the trains operated, so far as you have personally observed, as frequently on Sundays as on week days?

A. On Sundays, about 12 o'clock on Sundays, when I have the sermon I have to stop sometimes.

Q. I have asked you if there is any variation or difference **in** **20** the extent of this noise from operating the trains on Sundays, from week days, is it less on Sundays, or is there any perceptible difference.

A. On Sundays it is the same thing as on week days.

Q. It isn't the same, did you say?

A. I think it is the same.

Q. If there is any cessation you have not noticed it?

A. No, it is such a big noise that when the priest is singing the Mass sometimes the organist cannot hear to make the responses, and the people cannot hear.

Adjourned to Wednesday, July 19th, at 10.30 A. M.

30

In the Circuit Court of the United States for the District of New Jersey.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA,

Complainant,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Defendant.

10

Hearing in the above entitled matter before Hon. George R. Beach, Examiner, at 75 Montgomery street, Jersey City, N. J., July 19th, 1911, at 10.30 A. M.

Appearances—MR. F. M. HARDENBROOK, of counsel for the complainant; MR. ALBERT C. WALL, of counsel for the defendant.

Continuation of Direct Examination of Rev. Boloslaw Kwiatkowski suspended.

20 STANLEY GOLLIEK, being called as a witness by the complainant, and sworn according to law, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Where do you live? A. Jersey City.

Q. Whereabouts? A. 127 Chestnut avenue.

Q. How long you lived there? A. Six years.

Q. What is your business? A. Contractor.

Q. What kind of work?

A. Concrete work and fireproofing.

Q. Where are you engaged in business?

30 A. At 30 Church street, New York City.

Q. How long have you been in that business? A. 20 years.

Q. Are you a member of the Roman Catholic Church of St. Anthony of Padua? A. Yes.

Q. How long have you been a member of that church?

A. About fifteen years.

Q. Have you any children attending the school connected with the church, on the corner of Brunswick and Sixth?

A. Yes, sir.

Q. How many children have you? A. Five.

40 Q. When did you first send your children to that school, about how long ago? A. About nine years ago.

Q. And how long did they go to that school?

A. Some of the children are small; one is sixteen, and the other is ten; the first they started would be about nine years ago, and the little one about five or six years ago.

Q. That is the age of the children?

A. That is the age.

Q. How long did they attend that school?

A. I took them out about two years ago.

Q. Why?

A. They complained of too much smoke and too much noise. 10

Mr. Wall—Objected to by defendant; I ask that that be stricken out as hearsay and incompetent.

Q. Have you ever observed the children's clothing before they went to school? *A.* Yes, sir.

Q. Did you ever observe their clothing after they came back from school? *A.* Yes, sir.

Q. What was the condition of it when they went to school?

A. The condition of it before they go to school is in good condition; send the children clean.

Q. What was the condition of it when they returned from 20 school?

A. The condition is that they get dirty where they sit down on the bench and get dirty when they put their arms on the table, and get dirty all around from the dust from the windows open.

Q. What was the general character of this dirt which you saw on your children's clothing—what was it like?

A. Like dust come from the chimney, like dust and ashes.

Q. You are familiar with the dirt which your children would get on their clothes playing in the street, playing with other children? *A.* Yes.

Q. Was this dirt they got on their clothes in the school different from the dirt they would get from playing in the street?

A. Yes.

Q. How was it different?

A. The other what come from the school is kind of like grease and black; dust from the street that is different kind, that is gray.

Q. Difference in the color? *A.* Yes, gray color.

Q. Have you ever been in the school while your children were there? *A.* No, not much.

Q. Have you ever been in the school while your children were there—while they were there? 40

A. A couple of times, when they had some celebration.

Q. How long were you there at those times?

A. That was three years ago.

Q. How long were you there? *A.* Hour or hour and a half.

Q. Do you know the location of the Pennsylvania Railroad there? *A.* Yes, sir.

Q. And the operation of the trains, have you noticed that?

A. Yes, sir.

Q. While you were in the schoolhouse on these two occasions did you notice anything in the schoolhouse due to the operation of these trains?

10 *A.* Lots of noise, and the smoke coming through the windows.

Q. Describe what noise you noticed in the schoolroom while you were there on those two occasions coming from the railroad?

A. Noise from the engine, puffing and from the exhaust pipe.

Q. I asked you about the noise, did you hear any other noise than the noise from the puffing of the engine?

A. The noise from the cars, engines stopping, the cars bumping against one another.

Q. What do you mean by puffing?

20 *A.* Puffing from the engine; the engine stop and throw the steam out, and throw the ashes out.

Q. Was that noise of sufficient magnitude and quality, so far as you were able to notice, to interfere at all with the school services, so far as you were able to personally notice.

Mr. Wall—Objected to by defendant as irrelevant and immaterial.

A. Yes.

Q. Did you notice anything else besides the noise coming from the operation of the railroad on these two occasions when you visited the school—anything else besides the noise?

30 *A.* I see the smoke.

Q. What about it? *A.* The smoke coming from the engine.

Q. What about it—what effect did it have in the school?

A. If the windows was open the smoke come through into the school from the chimney of the engine.

Q. You saw that yourself? *A.* I saw that.

Q. On these two occasions, or one? *A.* On both occasions.

Q. Are you a member of the church? *A.* Yes.

Q. How long you been a member of that church?

A. Fifteen years.

40 *Q.* Are there every Sunday? *A.* Yes.

Q. Go to week-day services during holidays and other times?

A. Yes.

Q. What have you ever noticed in the church in regard to the operation of this railroad?

A. On the smoke or on the noise?

Q. I don't know whether you have ever noticed either one, I am asking you if you noticed anything? *A.* Yes.

Q. What?

A. We have got the same thing as in the school, lots of noise from the engines, and if the windows is open we get the church full of smoke and dust.

Q. How long have you noticed that, for how many years past? 10

A. I was steady in that parish, and the same thing is all the time.

Q. Is that noise of sufficient magnitude to interfere with the services?

A. Yes, sometimes the engines stay there for half an hour, and sometimes longer; go up a little further, and then come back, switching, and the cars bump one against the other, and make so much noise that you cannot hear the organ lots of times.

Q. What? *A.* So much noise cannot hear the organ.

Q. You do hear, or don't hear?

20

A. Don't hear; don't know what the priest is speaking on the pulpit from the noise.

Q. Can't you hear what the Father conducting the services says?

A. Very little on account of the noise.

Q. Do you ever know of any occasion when he had to desist, had to suspend the services until the noise stopped?

A. Couple of times stopped the service, when it is hot weather and the window open, from the dust and noise and smoke.

Q. That you have noticed a couple of times in the past fifteen 30 years? *A.* Yes.

Q. How about the smoke?

A. That is the smoke, too; I see the Father has got to stop the speeching on account of the smoke and dust threw out from the engine through the windows.

Q. He don't stop the service on account of the smoke, does he?

A. Yes; stop and call the man to close the windows.

Q. You have noticed that how often?

A. That is in summer-time very often; when the windows are open.

40

Q. It is on an average of every Sunday, or once a month?

A. Depends on the weather; if it is hot weather and if all the windows open on that side, then that trouble comes.

Q. Have you ever noticed any soot or cinders or substance on the seats? *A.* Yes, I did.

Q. When?

A. When I got on a light suit, or the children got on light dresses, you can see right after the Mass is finished so much ashes on the clothes, and right on the hats, too.

Q. For how long a time have you noticed that?

A. Noticed that all the time.

Q. How long is all the time?

10 *A.* Especially summer-time, when the windows are open.

Q. How long have you noticed it?

A. Since I have been going to the church; fifteen years I belong to the parish.

CROSS-EXAMINATION, by Mr. WALL:

Q. No trouble when the windows are closed?

A. Not so much trouble, except the noise; not so much noise as when the windows are open.

20 *Q.* Were you a member of that church when they built the stone church? *A.* Yes.

Q. How long ago did they build the stone church?

A. They started to build the first time, I remember they built the first stone church; I remember fifteen years, but they built before that.

Q. Built the stone church before that? *A.* Yes.

Q. Second time?

A. Second time is only a few years ago—put an addition to the church about two years ago.

Q. Was that a little addition or a big one?

30 *A.* Big one; pretty near half.

Q. What? *A.* About half.

Q. Did you do the work?

A. There was put half more to the church.

Q. Did you do the work on it? *A.* No.

Q. You didn't have the contract? *A.* No.

Q. Have you got any position in the church? *A.* No, sir.

Q. Are you an officer or anything? *A.* No.

40 *A.* Didn't any one object to spending all this money on the church two years ago on account of the railroad being so near there?

A. There was a meeting; I was not to the meeting; I don't know anything about it.

Q. You don't know what happened at the meeting?

A. No, I don't know what happened.

Q. Now, your children get dirty when they wear white dresses wherever they go?

A. When they go to that school, and I took them out and sent them to St. Joseph's.

Q. They don't get dirty there? *A.* No.

Q. They can wear white dresses and they never get dirty up there?

A. Unless the dust from the street, that is different. 10

Q. In the school where they go now they never get any dirt?

A. When they go to St. Joseph's, not.

Q. The white dresses stay clean for a week, do they, there?

A. I don't know after a week; a week is a time you could not keep clean for a week; we generally change every day clothes for the children, not a week.

Q. Do you know how much the new church cost a couple of years ago?

A. Couple of years ago; I don't know; I heard it is between \$50,000 and \$60,000; I don't know exactly because I didn't belong to the committee. 20

Q. This bumping together of the trains in coupling—that usually happens whenever they are switching trains?

A. Yes, always they do that where there is switching; I don't know whether it is switching there or not, I am not on the track; the track is about 12 or 15 feet high; I didn't go there.

Q. You mean those are the ordinary noises of moving around railroad trains and switching them? *A.* Yes.

Q. And the smoke that comes from there is the same kind of smoke and dust you have had for fifteen years? 30

A. The smoke was always from the railroad; from the soft coal; it couldn't be one day different from the other.

Q. What you mean to testify to is the ordinary noise and ordinary smoke from a railroad that is operated by the burning of soft coal?

A. I don't know whether it is ordinary or extra.

Q. You don't know that?

A. No, I only know it is noise and smoke coming from the railroad; I don't know ordinary or extra.

Q. Why don't you know whether it is ordinary or extra? 40

A. Because I didn't pay attention to that.

Continuation of Direct Examination of Rev. BOOSLAW KWIATKOWSKI, by Mr. HARDENBROOK:

Q. Are you familiar with the neighborhood immediately surrounding your church? *A.* Yes.

Q. And what would you say as to the general character of that neighborhood as to being a residential character, or a factory character? *A.* All residential.

Q. All residential?

A. For about seven blocks there is only one factory; about 10 seven blocks from my church and house there is a factory—Dixon's.

Q. Dixon Crucible Co.? *A.* Yes.

Q. About seven blocks from your church? *A.* Yes.

Q. Is that the nearest manufacturing establishment to your church that you could find?

A. Yes, to my knowledge; I did not see any others.

Q. You have made a personal investigation and examination of the neighborhood, have you not, to ascertain as to whether there are any factories in the neighborhood? *A.* Yes, I did.

20 *Q.* For that purpose? *A.* For that purpose.

Q. Are there any establishments of any character within those seven blocks, inside of that seven blocks, which are using or burning fuel of any kind which emits black smoke, so far as your investigation enabled you to determine?

A. There is another railroad tracks; the Pennsylvania Railroad.

Q. About how near to your church is that?

A. About five blocks, I guess.

30 *Q.* And aside from that there are no other establishments of any kind? *A.* I do not know any others.

Q. In the past six years have you ever observed any engines of the defendant standing on the track of the railroad immediately opposite or in the immediate vicinity of your rectory?

Mr. Wall—Objected to by defendant as immaterial.

A. I see that every day, and I have some times put it down, each train, and what days it stops; I can give you some examples.

Q. Now state what you can as to what you have noticed in regard to the engines standing on the track?

40 *A.* May 30, 1911, locomotive Pennsylvania Railroad, No. 966, at one o'clock.

Q. Day or night?

A. P. M. Heavy smoke was there from that standing locomotive; 20 minutes that stopped.

Q. How long did that remain on the track? *A.* 20 minutes.

Q. What was it doing at that time?

A. Standing and puffing very heavy black smoke.

Q. What is the next?

A. The next on June 26, 7.10 P. M., No. 666, Pennsylvania Railroad engine there moving up and down.

Q. You mean up and down?

A. Up and down, moving about fifteen minutes.

Q. And what was it doing when it was moving?

A. Emitting extraordinary heavy smoke; that took my attention. Now, another locomotive, No. 668, Eastbound train, ten minutes standing, opposite my house and church, and produced very heavy smoke and noise of exhaust steam. 10

Q. That is Pennsylvania Railroad engine?

A. Yes, I don't talk about others, because I got only those. Now, July 12, 1911, for instance, No. 2,548, Pennsylvania locomotive standing opposite my house, with very heavy black smoke, at 7.30 P. M.

Q. How long did it stay there—have you got anything to show—was it only there for a minute, or longer? 20

A. About ten minutes; now, the other one, No. 1,071, opposite the house standing, with very big noise of exhaust steam and black smoke.

Mr. Wall—Did you write these out yourself?

A. Yes.

MR. HARDENBROOK:

Q. How long was it there, Father?

A. About fifteen minutes; now, locomotive No. 2,963, Pennsylvania Railroad, same as the other.

Q. How long was that there? 30

A. Same as the other, about fifteen minutes.

Q. That all the memoranda you have got?

A. Now, July 17, for instance, No. 2,554, train going out at 2.30.

Q. Going West?

A. I say going out from the city; that is, West; 2.30 P. M.

Q. What was it doing?

A. Passing, and giving very heavy smoke.

Q. How long was it there, does your memoranda show?

A. Passing, going out; now, there is No. 2,509, at 3 P. M., 40 standing and moving, and this attracts my attention that in this

train no smoke and no noise on this train, but as soon as they pass my house then they puff very heavy smoke.

Q. While it was opposite your house there was no smoke being emitted?

A. No smoke from this train, and I see one, I don't know the number of the train, passing at 2.40; that didn't make noise, too; that strikes me if they want not to do any noise they can do it.

Mr. Wall—I ask that that be stricken out as conclusion.

10 *Q.* Now, in the operation of this railroad, Father, have you noticed whether they do any what is known as making up of trains; that is, switching backwards and forwards and connecting the cars in front of your house?

A. In front of my house and church and school; we have not one day free of that.

Mr. Wall—Objected to by defendant, and I ask that it be stricken out on the ground that it is irrelevant.

Q. Do you understand what I mean by making up trains?

A. I understand.

20 *Q.* What do you understand by that?

A. I understand making up a train, to put locomotive on the tracks and add more and more cars to it; this is very big noise.

Q. Have you ever noticed that being done upon the piece of railroad between Monmouth and Brunswick streets?

Mr. Wall—Objected to on the ground of its immateriality, and also that the Company has a perfect right, under its charter, to make up its trains and run its railroad in the place in question.

A. Yes.

30 *Q.* Did you ever make any complaint to the Railroad Company or to any of the officials, as to any of the conditions of which you now complain?

A. Yes, about two years ago.

Q. Who did you write to?

A. I wrote a letter to the President of the Company in Philadelphia, and asked him to stop—

Mr. Wall—Objected to by defendant as not the best evidence; witness should not give the contents.

And he answered me.

40 *Q.* Have you got that answer? *A.* I have not got it here.

Q. Have you got it at your office or residence?

A. I will try to find it out.

Q. Did you ever make any complaint to any one else—the Board of Health, the Mayor or Governor, or any one else?

A. I have a meeting with neighbors in my school house, and we have the doctors there, and about three hundred people at this time living between Fifth and Sixth street.

Q. Did they ever make any complaint to anybody, did they ever formulate any complaint?

A. It was with the city authorities.

Q. To whom do you refer?

A. The Board of Health and Mayor.

10

Q. When you first took charge there, Father, there was a wooden church, was there not, on the present site?

A. No, that same church.

Q. And some years later you caused an addition, an extension to be put on the rear of it?

A. Yes, on the rear, further back.

Q. Do you know of your own knowledge substantially the cost of that church, how much money it cost to build—do you know what the building cost?

A. Not figuring the land; I paid the last payment to the contractor when I came here.

20

Q. That was for the addition?

A. No, that is sixteen years ago.

Q. What did the addition cost?

A. That addition cost me over \$50,000.

Q. That you contracted for and paid for yourself? *A.* Yes.

Q. What did the school-building cost, if you know—was that built after you came here?

A. That was built in my time.

Q. What did it cost, exclusive of the land? *A.* \$72,000.

30

Q. What did your parish-house or rectory cost?

A. Between \$25,000 and \$26,000.

Q. You have testified, Father, in reference to the times you have seen volumes of smoke coming from the smoke stacks of these locomotives—have you ever noticed as to whether that had any effect upon the light in your rectory or in the school or in the church—ever notice whether it had any effect on the light?

A. Of course, it made it dark.

Q. Describe what you have noticed in regard to the effect which this smoke has had upon the light?

40

A. When the heavy smoke comes from the locomotives of the Pennsylvania Railroad, opposite my house and church and school, I can see that it covers the sun, and on account of that it is dark

in the rooms in the school and in the house and the church; obscures the light.

Q. Have you noticed what effect this substance, this smoke, has had on the window panes; that is, the glass, in the rectory and church and school? *A.* The windows?

Q. Yes, I mean the glass, have you noticed what effect that has?

A. It makes them black; that soot stands right on the window, on the glasses.

10 *Q.* This church is stone, is it not? *A.* Stone.

Q. And the rectory? *A.* Is brick and stone.

Q. And the schoolhouse? *A.* Brick.

Q. What character of roofs have they got? *A.* Slate.

Q. On the church? *A.* Yes.

Q. On your residence? *A.* Slate roof also.

Q. And on the school? *A.* On the school part is slate, and part is tin roof; on the church there is some parts tin roof also.

Q. About what proportion, if you can make some fair estimate?

20 *A.* Above the sacristy is tin roof; I will explain that; since two years we have got the sacristy and there is tin roof above those sacristies; and we have tin on the small towers in front of the church, and the cornices, tin cornices.

Q. Have you ever, of your own personal knowledge, Father—I am asking of your own personal knowledge, noticed what effect, if any, this substance coming into the church with the smoke, has had upon the clothing of the members of the congregation, or communicants?

A. I have many complaints that they damaged their clothes.

30 *Q.* Have you ever seen the effect which it has had? *A.* I did.

Q. What did you notice in regard to that?

A. Black spots on their clothes.

Q. For what period of time, extending over what period of time have these complaints been made?

A. Seven or eight years; longer, too; that is, all the time from the beginning I came.

Q. Is it a matter of frequent or common occurrence?

Mr. Wall—Objected to by defendant as immaterial.

Q. Is it a matter of rare occurrence or frequent occurrence?

40 *A.* Frequent.

Q. Have you noticed of your own personal observation the effect which this substance coming from the smoke from the railroad has had upon the clothing of the children of the school?

A. Yes, also in the school, the children get dirty dresses; when they come in the morning they have clean dresses; when they leave the school they have their dresses black.

Q. Have you procured an estimate to be made by some one engaged in the interior decoration of church work as to the cost of decorating the church? *A.* Yes.

Q. That estimate which you have procured to be made was made by the Rambusch Decorating Company, of 45th street and Fifth avenue, New York, was it not? *A.* Yes.

Q. I do not know that I have asked you heretofore, but if I 10 have not I will ask you now; in addition to the church services, which are performed every Sunday, and also every day throughout May and October, there is Mass also said every first Friday of the month, is there not.

A. Yes, every first Friday.

Q. And vespers every evening of the first Friday of every month?

A. Yes, we have that.

Mr. Hardenbrook—With the exception of having probably to recall Father Kwiatkowski on the question 20 of such expenditures as he may have been called upon to make in connection with the matters for which damages are claimed in the complaint of plaintiff, as finishing the direct examination of witness, counsel for defendant consents to cross-examine on the direct as put in, reserving the right to further cross-examine when the testimony concerning the expenditure above named is offered.

CROSS-EXAMINATION, by Mr. WALL:

Q. You heard the testimony of the photographer who said that he saw the smoke hanging and remaining in the chancel for a number of minutes? *A.* Yes.

Q. You heard that testimony?

A. Yes. That remains on the chancel, that smoke.

Q. Did you hear the testimony of the photographer who said that he had seen the smoke inside the church hanging for a long time, stayed there a long time above the chancel?

A. I heard him tell; he didn't tell anything how long; you say long time; I didn't hear that he said long time.

Q. How long did you ever see the smoke stay in the chancel?

A. I see it standing in the chancel, but I don't know how long.

Q. Can you give any idea of how long it stayed in there?

A. Until it goes out.

Q. That is the best you can say? *A.* Yes.

Q. You don't know whether it stays there ten seconds or half an hour? *A.* No, I don't know.

Q. Do you understand my question? *A.* Yes.

Q. Have you ever seen the smoke come in in a body through the window, big puffs of smoke?

A. Big puffs of smoke, yes; right through the church, and through the house and through the school.

10 *Q.* I am asking about the church—you have seen the smoke come in in a puff through the window?

A. I have seen the smoke coming, yes.

Q. And then you have seen it in the church? *A.* Yes.

Q. How long have you seen it in the church?

A. Until it goes out.

Q. And you can't say whether it takes one second to go out or whether it takes a half an hour to go out? *A.* No.

Q. That is the best answer you can give, is it? *A.* Yes.

Q. Did you ever see it go out? *A.* What?

20 *Q.* The smoke, did you ever see it go out? *A.* After—

Q. After you have seen it come in did you ever see it go out?

A. It disappears; it disappears after a while.

Q. How long does it take to disappear?

A. Ten minutes—fifteen minutes.

Q. You have seen it stay in the roof of the church for fifteen minutes? *A.* What—in the roof?

Q. The smoke? *A.* Where.

30 *Q.* When the smoke comes in through the windows you have seen the smoke stay under the roof, under the eaves of the church for fifteen minutes?

A. Yes; that is, in the beginning it is black, dark, and later on it is always thinner, thinner; it disappears; I don't know how long it takes that.

Q. You said fifteen minutes? *A.* Well, yes.

Q. You have seen it stay there fifteen minutes?

A. I did not watch fifteen minutes.

Q. What did you mean by the fifteen minutes?

A. I do not know how long it will take that.

Q. What did you mean by the fifteen minutes?

40 *A.* I mean fifteen minutes.

Q. What? I mean fifteen minutes; it takes time for the smoke to go out from the church.

Q. During that fifteen minutes you have seen the smoke above your head in the church?

A. What do you mean?

Q. Don't you understand that?

A. You think I have to look all the time on the ceiling?

Q. I did not ask you all the time?

A. Sometime I do not pay any attention to it.

Q. Sometime—but there was some time when you paid attention to it, and you noticed it stayed there for fifteen minutes?

A. Yes.

10

Q. Then that time that it stayed there fifteen minutes the smoke hung above your head and above the heads of the people in the congregation for fifteen minutes, is that right?

A. You mean standing all the time?

Q. Yes. *A.* It decreases; it gets less and less.

Q. It got less and less for the fifteen minutes?

A. Yes, until it disappears.

Q. But during the fifteen minutes it hung in the air above your head? *A.* I tell you already; I answered already.

Q. That is the only answer you will make? *A.* Yes.

20

Q. Then the smoke is lighter than the air?

A. I don't know that.

Q. You don't know that? *A.* No, I am not expert in that.

Q. Don't you know that if the smoke is heavier than the air the smoke will fall? *A.* I don't know.

Q. Are you a graduate of a university? *A.* Where?

Q. I am asking you? *A.* Of a university, no.

Q. You have been to school? *A.* Yes.

Q. Did you come from Warsaw? *A.* Yes.

Q. Did you go to the University of Warsaw?

30

A. Not the university; I go to a seminary.

Q. You know the law of gravitation? *A.* I didn't study it.

Q. You never studied the law of gravitation? *A.* No.

Q. Then you don't know whether if the smoke were heavier than the air the smoke would fall? *A.* I don't know.

Q. You don't know that? *A.* No.

Q. Are you a property owner in Jersey City? *A.* Yes.

Q. Own property yourself? *A.* Yes.

Q. Own land yourself? *A.* Land? Yes.

Q. Where? *A.* I don't know if I should answer you that.

40

Q. Do as you please about it?

A. I guess I don't want to answer.

Q. You won't answer?

A. Surely not; that is not connected with the church.

Q. Do you own any property near the church yourself?

A. No.

Q. Do you own any land or buildings near the church?

A. No.

Q. Have you been in any business while you have been a priest here? *A.* I won't answer that question.

Q. You won't answer that question? *A.* No.

Q. Haven't you been President of the Krakow and Posen Company? *A.* I refuse to answer that.

Q. Have you been engaged in any business venture that has anything to do with any property near the church?

Mr. Hardenbrook—Objected to by complainant on the ground that it is irrelevant, incompetent and immaterial.

A. I refuse to answer.

Q. Who was it that decided that the new addition was to be made to the church?

A. The Committee and the Bishop.

Q. Did you start that? *A.* What.

Q. Did you bring it up first, that there should be a new addition to the church? *A.* We passed a resolution.

Q. Did you do it or did the Bishop?

A. We passed a resolution.

Q. Who brought about the addition—did you bring about the addition, or did the Bishop do it? *A.* The Committee.

Q. Who was the committee? *A.* The trustees and me; two trustees and me.

Q. And you urged it upon the trustees, you advised that there should be an addition to the church, did you not?

A. We have a meeting and discussed that question.

Q. Did you advise the trustees or not, to have an addition to the church?

A. I answered that question already; we have a meeting of the trustees, the Board of Trustees, and we decided to make the addition.

Q. When was that? *A.* About two years ago.

Q. Three years ago? *A.* Two years ago.

Q. And who were the trustees?

A. Machiejewski and Kanaby.

Q. There are only two trustees? *A.* Two trustees.

Q. And are you a member of the Board of Trustees?

A. Yes, sir.

Q. And these two other trustees, they are parishioners of yours? *A.* Yes.

Q. And you called them together and said that you had to have an addition? *A.* What?

Q. You called the trustees together and you said that the church should have an addition—that right?

A. They told me before that.

Q. They called you?

A. They didn't call me, but we were talking about it.

Q. Now, then, while you have been priest there the church 10 has invested over \$147,000 in school buildings, parish house and the additions? *A.* Yes.

Q. That is right? *A.* How much you say?

Q. \$50,000 and \$72,000 and \$25,000. *A.* Yes.

Q. When you first came there you say there was a stone church then? *A.* Yes.

Q. How big was the church when you came there?

A. 100 by 65.

Q. And you say that you have only been troubled the last seven or eight years by the smoke and noise? 20

A. Longer than that; from the beginning when I came, the last fifteen years I am here.

Q. So you have been troubled this way for the last fifteen years, ever since you been connected with the church?

A. Yes. Not in such a big extent as now.

Mr. Hardenbrook—If this line of examination is for the purpose of showing that the church has erected valuable improvements during the existence of the railroad and with knowledge of the existing nuisance, I object to this line of testimony for the reason that on coming 30 to a nuisance there is no defence to the equitable right to an injunction or for damages.

Q. What kind of dresses did the children wear in the school, white? *A.* Some white, blue, different dresses.

Q. You don't mean that the blue dresses turned black?

A. Spots.

Q. Do you know of an instance like that?

A. I don't know.

Q. Do you mean to say that you ever knew of any blue dress that was turned black by the smoke? 40

A. Turned black by the smoke?

Q. Yes.

A. Turned black by the smoke, I don't understand what you mean.

Q. You understand what turning black is; don't you?

A. Yes.

Q. You said the dresses were made black by the smoke?

A. Yes.

Q. You don't mean the blue dresses were made black by the smoke? A. Light blue, yes.

Q. Do you know of any light blue dress that was made black
10 by the smoke, ever turned black by this smoke?

A. I see it.

Q. Do you now it or not? A. I know it.

Q. And you swear that blue dresses were turned black?

A. Light blue, damages and left black spots.

Q. Oh, you didn't mean the dress turned black? A. No.

Q. Now, you didn't make any memoranda of how long these engines stood there? A. I did.

Q. What? A. I did.

Q. Timed them with the watch. A. Yes, I watched them.

20 Q. Timed them with the watch. A. Yes.

Q. You saw an engine and pulled out your watch and looked to see how long it stood? A. Yes.

Q. You didn't mean that the engines when they passed your house on the railroad made more noise and smoke just because they were passing your house, did you?

A. Explain me better.

Q. You said that an engine which you were watching when it passed your house it came up without any noise and without any smoke, and when it got opposite your house it made a good deal
30 of noise and emitted a good deal of smoke, did you mean by that that the Railroad Company purposely and intentionally made noise and emitted smoke in front of your house?

A. I mean that they can stop noise or smoke if they wish.

Q. That is all you mean?

A. Yes, they can stop; decrease or increase.

Q. And you think because they don't make smoke all the time and because they don't make noise all the time, that therefore it is not necessary to make smoke any of the time or noise any of the time, is that right?

40 A. I cannot answer you that question.

Q. Why can't you answer it, don't you understand it?

A. I am not professional man.

Q. You don't know anything about running railroads or the

operation of a railroad or the operation of an engine, or the combustion of coal, do you? *A.* No.

Q. When did you make this examination of the neighborhood to see whether there were any factories around there?

A. Last Friday.

Q. Did you find the Jersey City Coal Company plant, do you know where that is? *A.* Yes.

Q. That is only a block away, isn't it, from your parochial school? *A.* A little over.

Q. And they have coal pockets there, don't they? 10

A. They have, yes.

Q. Where they load coal and the dust sifts into the atmosphere? *A.* They have pockets.

Q. Good deal of coal dust comes from there, don't it?

A. Yes, that is not from smoke.

Q. But a good deal of coal dust comes from there—as they shoot the coal from the coal pockets the wind blows it around?

A. No.

Q. You have never been there to examine that? *A.* No.

Q. You don't know whether any coal dust comes from there or not? 20 *A.* What do you mean, dust?

Q. What do you mean by dust?

A. I am only talking about the dust coming into my church from the Pennsylvania locomotives, I see that.

Q. Didn't you examine any of these other places to see if they sent any dust into your church? *A.* They don't.

Q. Did you examine them? *A.* I did.

Q. How about the cooperage shop, do you know where that is?

A. Which one?

Q. The one that fronts on Seventh street. *A.* Where to. 30

Q. On Seventh street between Division street and Brunswick?

A. They have no factory there.

Q. No dirt comes from there? *A.* No.

Q. Do you know that place? *A.* I know that place.

Q. You do know it? *A.* I know it.

Q. Did you see that in the examination that you made?

A. I have never seen any smoke there.

Q. Did you see that in the examination that you made?

A. There was no smoke there.

Q. I am asking you whether you saw it there? 40

A. There was no smoke.

Q. You didn't go there? *A.* I was there.

Q. When? *A.* Last Friday.

Q. At that cooperage place?

A. On the street. There is no factories around there only Dixon's, about seven blocks from my church property.

Q. When did the Italian Catholic Church put their church there? *A.* I don't remember.

Q. What? *A.* I don't remember.

Q. Was that there when you came? *A.* What?

Q. That Italian Roman Catholic Church?

A. There is a church.

10 *Q.* Was that there when you came there? *A.* It was.

Q. Was it already built then? *A.* They have a new church.

Q. When was that built? *A.* I don't remember.

Q. How many years ago? *A.* About five years, I guess.

Q. Is that a fine, expensive building?

A. It is a nice building.

Q. Stone? *A.* No, brick and stone.

Q. How old are you? *A.* Forty-eight.

Q. Has the church grown there much since you have been there—in numbers? *A.* Yes.

20 *Q.* Been a very successful church? *A.* It is successful.

Q. How often is the church cleaned? *A.* Every day.

Q. Do you know that? *A.* I know that.

Q. The sills cleaned every day? *A.* Not every day.

Q. How often are the sills cleaned?

A. A couple of times in the week.

Mr. Hardenbrook—Do you know what he means?

A. Window sills, I mean.

MR. WALL:

30 *Q.* How often do you say? *A.* Couple of times in the week.

Q. Do you know that or is it just a guess? *A.* I know that.

Q. Have you ever had any complaints from any of your parishioners that the church was not cleaned often enough?

A. Yes.

Q. Now, in the attic of the rectory there is a billiard room?

A. No; no billiard room.

Q. What do you keep up in this attic?

A. I keep everything that is not necessary to keep in the rooms.

40 *Q.* And how long has that piece of wall paper been there?

A. About two years.

Q. Do you remember when it was put there?

A. I don't remember the date.

Q. Do you remember whether it is two or four years?

A. About two years; it was remnants of wall paper which they put in my rectory; I put the remnants up there.

Q. And you say it was about two years ago?

A. About two years ago.

Q. They had never been cleaned, of course, in the two years, that wall paper? *A.* Every piece?

Q. Yes? *A.* No.

Q. So that is the whole deposit of two years there on that piece? *A.* Yes.

Q. Any members of your family own land right around the church? *A.* I won't answer that question.

Q. Have you got any brothers? *A.* I have.

Q. Here in town? *A.* Yes, here in town.

Q. Have they bought any land near the church in the last five years?

Mr. Hardenbrook—Objected to by plaintiff on the ground that it is immaterial, irrelevant and incompetent.

A. I decline to answer.

Q. I notice that this may shows, this map I call your attention to, that there are only four tracks opposite the rectory, on the elevation?

A. I count myself six; I see it.

Q. Isn't that down opposite the church where the six tracks are? *A.* Alongside of the church.

Q. But opposite the rectory there are only four tracks?

A. I counted six; I see it.

Q. How many windows of the church front on Sixth street?

A. Three windows and half a window.

Q. Are you troubled by the smoke when the windows are closed?

A. I have to close the windows when the smoke is coming into the church.

Q. When you close the windows the smoke doesn't come into the church? *A.* The smoke, no.

Q. Are you interested in the ownership of White Eagle Hall?

A. I won't answer that question.

Q. Where is White Eagle Hall?

Mr. Hardenbrook—Objected to by complainant on the ground that it is immaterial, irrelevant and incompetent. 40

Q. Do you decline to say where White Eagle Hall is?

A. I do.

Q. You don't mean to say the smoke travels against the wind, do you? *A.* I am not specialist in that.

Q. You don't know whether the smoke travels against the wind or not? *A.* I am not expert in that.

Q. You don't know? *A.* I am not expert in it.

Q. Is that the only answer you will make to that question?

A. Yes.

Q. You never have made any observation, expert or not expert, from which you can tell whether the smoke will go 10 against the wind or not? *A.* No.

Q. So as you sit here, you don't know whether the smoke goes against the wind or not, that right?

A. The smoke goes against the wind?

Q. Yes?

A. In my opinion it depends how heavy is the smoke; if the smoke is heavier than the wind then naturally it goes against the wind; that is all.

Q. You know that leaves are heavier than air, don't you?

A. What leaves?

20 *Q.* Leaves of trees? *A.* I don't know that.

Q. You don't know that? *A.* No.

Q. Did you ever see leaves fly up from a tree when there was no wind? *A.* No, I didn't make those observations.

Q. You know that leaves fall from trees, don't you? *A.* Yes.

Q. Well, if they were lighter than the air they would fly up, wouldn't they?

A. If the wind is heavier than the leaves certainly the leaves will always fly with the wind.

30 *Q.* Now, suppose no wind is blowing and a leaf becomes detached from a tree, will the leaf fly up or fall down?

A. I suppose it will fall down.

Q. Then you do know that leaves are heavier than air, don't you? *A.* Didn't I answer?

Q. No, you have not. *A.* I did.

Q. You said you didn't know—don't you know that?

A. Some leaves are very heavy; some are very light; if they are dry they are very light.

Q. And if they are lighter than the air they will go up, will they not?

40 *A.* No, sure not.

Q. They won't?

A. They won't; no. If they are lighter than what?

Q. Lighter than the air.

A. If they are lighter than the air they will go up?

Q. Will they go up or go down?

A. If they are lighter than the air?

Q. Yes, don't you know?

A. If they are lighter than the air—I don't know where they will fall.

Mr. Hardenbrook—You never made investigation of those subjects, did you, Father?

A. I never made such observations; that is all.

Mr. WALL:

10

Q. Is this sample that you got from the attic that you brought here the same sample that you had before the Police Court?

A. Yes.

Q. It is? *A.* It is.

Q. You are sure of that? *A.* Yes.

Q. You swear to that? *A.* I did because I take that myself.

Q. Didn't you testify that you got that sample two or three days before this examination here?

A. I didn't bring the same; I got others.

Q. I thought you said it was the same?

20

A. Not the same; that is the same quality.

Q. Did you take any other samples from other rooms in the rectory?

A. I did not.

Q. Why did you pick out the attic? *A.* What?

Q. Why did you pick out the attic—why did you bring the sample from the attic?

A. To show from different place, that is in the attic, and the second and third floor and in the church.

Q. You have said that the attic is never cleaned?

30

A. The attic—it is cleaned, yes.

Q. You have said that that piece of wall paper was not cleaned. *A.* Yes.

Q. That is true? *A.* That is true.

Q. When was the attic last cleaned before you brought that sample? *A.* I don't know.

Q. When was the sill from which you brought the sample that you took in the church—when was that sill last cleaned before you took the sample? *A.* Three or four days.

Q. How do you know?

40

A. I know because I asked the janitor when he clean it.

Q. You don't know from anything you saw yourself?

A. I see myself.

Q. You saw yourself?

A. I asked him when you clean it last time; I saw the dust there.

Q. You didn't see him clean it?

A. I asked him when he cleaned it; he told me.

Q. The smoke doesn't come in the church when the windows are closed, does it? *A.* Not in such big quantity.

Q. Does it come in in any quantity? *A.* Yes.

Q. When the windows are closed?

10 *A.* Yes, because between the windows there are spaces, small spaces.

Q. Not tight? *A.* Not tight.

Q. Why don't you have those fixed—you say around the church windows there are small spaces, open spaces?

A. Not open spaces.

Q. What are those spaces? *A.* Joints.

Q. Are they tight, the joints?

A. Not always; if they are not closed very well there are little joints, little openings.

20 *Q.* When the windows are closed very well, then the smoke does not come in, does it? *A.* No.

Q. Have you electric lights in the church? *A.* I have.

Q. Gas? *A.* Yes.

Q. So you don't mean that the smoke coming in there ever bothers you on account of the darkness?

A. For awhile, yes; for a moment.

Q. That is, half a second?

A. As soon as the smoke gets thinner; when the smoke gets thinner, I mean.

30 *Q.* What class of people live in that neighborhood, around the church, in those residences, what class of people.

Mr. Hardenbrook—Objected to by complainant on the ground that it is immaterial, irrelevant and incompetent.

Q. Railroad employes and people like that?

A. I know there don't live there any magnates.

Q. Do you know what those houses rent for around there?

Mr. Hardenbrook—Objected to by complainant as irrelevant, immaterial and incompetent.

40 *A.* I don't know.

Q. You don't know? *A.* I don't know.

Q. Can't you give us any better idea about those people than just to say they are not magnates?

A. I could not; working class of the people, mechanics.

Q. Firemen and brakemen and people like that?

A. I guess so, but I didn't investigate that.

Q. You never have investigated that? A. No.

Q. Do you still adhere to your refusal to tell whether you own any property in the vicinity or not? A. Yes.

Q. Do you know whether there are any railroad tracks of any other railroad near your church except the Pennsylvania?

A. Not near.

Q. How far off is there any other railroad?

10

A. There is on Eleventh street, that is the Erie Railroad.

Q. That is on Tenth street? A. I guess it is Eleventh.

Q. It is between Tenth and Eleventh?

A. It might be between Tenth and Eleventh.

Q. And the Erie takes up with its tracks the whole distance between Tenth and Eleventh? A. What?

Q. Its tracks take up the whole distance between Tenth and Eleventh? A. I don't know.

Q. There are four blocks between you and the Erie Railroad?

A. Five blocks.

20

Q. That is, there are five blocks between the Pennsylvania Railroad and the Erie Railroad? A. Yes.

Q. But between the block in which your church is, and the Erie, there are four blocks?

A. Five blocks; I insist on that because I count it.

Q. That is, you count the block in which your church is as one? A. One, yes.

Q. Now, isn't there a factory four or five blocks away from you known as the Paper Box Factory, on Brunswick street?

A. It is further; there is a box factory corner of Brunswick and Ninth.

Q. Isn't there a factory and machine shop of the Magnus Metal Company, on Ninth street near Brunswick—that is five blocks away from your parochial school?

A. Perhaps it is there; but that doesn't bother me.

Q. Do you know whether it is there or not?

A. I don't know, it never troubles me.

Q. Do you know whether they use soft coal in that factory or not? A. I don't know.

Q. Do you know whether the Erie uses soft coal?

40

A. I hear they use soft coal, but I didn't investigate that.

Q. Do you know whether you get any smoke and dust from the Erie Railroad? A. No.

Q. You don't know?

A. We have not got any smoke from there.

Q. No dust from the Erie? *A.* No, it is too far.

Q. Do you know where the New Jersey Junction is of that railroad? *A.* No, I was not there.

Q. Do you know whether they use any soft coal in Horton's Ice Cream Factory on Tenth street between Coles and Monmouth? *A.* I don't know.

Q. Do you know whether they use any soft coal in the Hat 10 and Cap factory between Coles and Monmouth?

A. No, that doesn't trouble me.

Q. Do you know? *A.* No, I don't know.

Q. Do you know whether there are any blacksmith shops on Sixth street on the block east of the block in which the Church is? *A.* No.

Q. You don't know whether they are there or not?

A. No, I have not got any trouble from there.

Q. You have never walked along Sixth street to find out whether there were any blacksmith shops there?

20 *A.* I didn't see any smoke.

Q. I didn't ask you that?

A. Perhaps there is, but I didn't see them.

Q. Don't you know whether there are or not?

A. Really I don't know.

Q. I am now asking you about Sixth street—on the next block west of the block in which the school and church are—that is, between Brunswick and Division streets, do you know whether there are any blacksmith shops there or not?

A. There is some buildings, small buildings.

30 *Q.* Do you know whether there are any blacksmith shops there or not? *A.* I think there is one blacksmith.

Q. Did you ever examine that to see whether any soft coal smoke came from there or not?

A. I did; I never see any smoke.

Q. When did you examine it? *A.* When I passed there.

Q. When? *A.* Passed there a good many times.

Q. You don't remember any time?

A. I don't remember any smoke there.

Q. You don't remember any time you examined it?

40 *A.* I didn't examine specially, but I never observed any smoke.

Q. Do you know where the ice cream factories are opposite the parochial school? *A.* Yes.

Q. Do you get ice cream from there for the school on festivals? *A.* No, I don't buy any.

Q. I mean the church? *A.* No.

Q. Do you know what kind of coal they burn?

A. I didn't see any smoke from there.

Q. Do you know what kind of coal they burn?

A. No, I do not know.

Q. Did you ever examine to see whether there was any smoke, or is that just like the blacksmith shop?

A. I never see any smoke from there. 10

Q. And you never looked to see whether there was any smoke?

A. Never made me any trouble.

Q. You never made any examination to see?

A. Because I didn't see the smoke.

Q. I am asking whether you made any examination?

A. I didn't make any examination.

Q. Did you either to the Board of Trustees or to the Bishop oppose the expenditure of these large sums of money in making the addition and building the school, and so on, because the railroad was near there? *A.* No. 20

Q. Did you ever mention it to the Bishop or to the trustees as a reason why you should not go ahead with the expenditure of the money? *A.* I did not.

RE-DIRECT, by Mr. HARDENBROOK:

Q. The trustees and the Bishop are familiar with the location of this railroad with reference to your church property, are they not—they know where this railroad is, don't they, with reference to the church property, both the Bishop and the trustees?

A. I think they know. 30

Q. The trustees know, don't they?

A. Yes, the trustees they know.

Q. Now, for about how long was this subject of the addition to the church under discussion before the addition was actually determined upon—how long had it been the subject of discussion? You say it was the subject of discussion between the trustees and yourself, about how long was it under discussion before the addition was determined upon, before it was decided to do it?

A. About three years before. 40

Q. What was the object of that addition?

A. The church was too small for the congregation.

Q. The congregation had increased to such an extent that the church as it existed was insufficient to accommodate the people?

A. Yes, it was too small.

Q. So far as the cleaning, the actual cleaning of the church and your residence is concerned, that is a matter which is left entirely in the hands of a janitor? *A.* Yes.

Q. You personally don't have anything to do with the cleaning—he has sole charge of the cleaning? *A.* Yes.

Q. And that is also true of your residence? *A.* Yes.

10 *Q.* And also true of the school? *A.* Yes, the same.

Q. You testified, Father, that you had made quite recently an examination of the neighborhood surrounding the church and school with a view to ascertaining what other establishments there are around there, if any, emitting smoke in their operations; if smoke had been coming from this blacksmith shop, was your investigation or your examination sufficient in extent to discover that fact?

Mr. Wall—Objected to as calling for conclusion, as conjectural and not the best evidence.

20 *Q.* You say you made an investigation of the neighborhood?

A. Yes.

Q. You were asked by counsel if you made any examination as to any smoke coming from the blacksmith shop, and you say you didn't see any smoke? *A.* I did not.

Q. Was your investigation sufficient to have discovered that fact had smoke been coming from the blacksmith shop?

Mr. Wall—Same objection by defendant.

A. I never see any smoke.

30 *Q.* Was the examination which you made sufficient to determine whether there was?

A. If I see smoke I will examine from what that smoke is, but if I never see any smoke then I do not examine.

Q. Then your examination was sufficient to determine whether or not there was? *A.* Yes.

Q. And that is also true of the establishments manufacturing ice cream, is it not?

Mr. Wall—Same objection by defendant.

A. The same.

40 *Q.* On the cross-examination you testified as to some openings in these windows which allowed smoke to come through the cracks or spaces, whatever you may have characterized them at: what is the general nature of those windows, are they composed more or less of religious figures of stained glass?

A. Stained glass, all religious pictures there.

Q. And those are made of small pieces of glass are they not?

A. Yes, leaded.

Q. Between them? *A.* Yes.

Q. And those spaces which you refer to, are they in the window frames themselves, or are they in these small pieces of lead surrounding the small colored pieces of glass.

A. The space comes all around any part of the figures there are in the windows; small pieces are surrounded by lead.

Q. Where are those spaces where the smoke comes in, are they around these small pieces of glass or around the frame of the window itself as an entirety—here is a window thirty feet high?

A. Yes.

Q. Where is the space—around the opening which that entire window sits in, or are these spaces around these little small pieces of colored glass which collectively create the figure—where are the spaces through which the smoke comes?

A. The windows have a ventilator, and it is almost impossible to make them shut tight there will never something come through as we have in the regular windows in the house; always is a little joint, so through this joint can come the smoke and dust.

Q. And that ventilator is hung on a pivot? *A.* Yes.

Q. And is worked by a string or cord? *A.* By a cord.

Q. And that is at the upper part or top of those windows?

A. Top and bottom.

Q. And that is about how big in size, what is the size of the ventilator? *A.* Three feet by the width of the window.

Q. The entire width of the window? *A.* Yes.

Q. At both the top and bottom of those three windows on that side of the church? *A.* Yes.

RE-CROSS, by Mr. WALL:

Q. Where is this White Eagle Hall?

Mr. Hardenbrook—Objected to by complainant as irrelevant, immaterial and incompetent.

A. I don't know.

Q. You don't know where White Eagle Hall is?

A. I won't answer.

Q. You mean that you do know, but you won't answer? 40

A. Yes.

Q. And are you not interested financially personally in White Eagle Hall?

Mr. Hardenbrook—Objected to by complainant as irrelevant, incompetent and immaterial.

A. I decline to answer.

Q. Did you not make an investment in White Eagle Hall, or the property in connection therewith, within the last three years?

Mr. Hardenbrook—Objected to by complainant as immaterial, irrelevant and incompetent and not within the issues of the action.

A. I do not answer.

10 STANISLAW KANIECGI, called as a witness by the complainant, being duly sworn according to law, testified as follows, by Interpreter:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. What is your name? *A.* Stanislaw Kaniecki.

Q. Where do you live? *A.* Jersey City, 473 Monmouth street.

Q. How long you lived there? *A.* Six years.

Q. What is your business? *A.* Organist.

Q. You are the organist connected with St. Anthony's 20 Church? *A.* Yes, sir.

Q. How long? *A.* Three years.

Q. Have you noticed the operation of the Pennsylvania Railroad in the immediate vicinity of the church?

A. Yes, sir; every day.

Q. What have you noticed in connection with it, specify what you have noticed? *A.* I have observed noise and smoke.

Q. What have you observed in connection with the noise?

A. When the train passes why it makes such a noise it disturbs the music and the service.

30 *Q.* How long have you noticed that?

A. From the time I have started in the church.

Q. What does that noise consist of?

A. From the steam that arises from the cars; the engines, and the cars bumping against one another.

Q. What have you noticed in connection with the smoke, if anything? *A.* The soot settles.

Q. Where?

A. On the books, the music and on the organ and the pipes.

Q. The keys?

40 *A.* Keys; some would not move at all.

Q. What? *A.* Keys.

Q. You mean they stick, explain that?

- A. Some keys do not work.
- Q. Why? A. I believe it is from the soot.
- Q. What does the soot do to the keys?
- A. Every day it falls in there; it settles there, sticks.
- Q. On the keys or between the keys?
- A. Between, where they move up and down.
- Q. What about the pipes?
- A. The pipes are uncovered and the soot settles in the pipes.
- Q. What effect does it have—does it help the music any? 10
- A. I fix it one day, and the second day it is as bad.
- Q. What effect does it have on the music on the pipes?
- A. Don't work right.
- Q. Well, how does it work wrong?
- A. When the whistle and noise comes there is noise, it kills the sound from the organ.
- Q. How long have you noticed that condition.
- A. From the last three years.
- No cross-examination.

FELIZ LABIENIEC, called as a witness by complainant, 20 being duly sworn according to law, testified as follows, by Interpreter:

- DIRECT EXAMINATION, by Mr. HARDENBROOK:
- Q. You are the janitor of the Roman Catholic Church of St. Anthony of Padua? A. Yes, sir.
- Q. How long? A. Six years.
- Q. What are your duties in connection therewith?
- A. I am the sexton.
- Q. What are your duties? A. I keep the church clean.
- Q. Have you observed the operation of the Pennsylvania 30 Railroad on Sixth street, adjoining Sixth street?
- A. I do, every day.
- Q. What have you noticed in connection therewith?
- A. As the windows are open the church gets full of smoke.
- Q. Anything else besides smoke?
- A. Every day I sweep the church and every day it continues to remain the same.
- Q. Do you sweep it out every day?
- A. The smoke settles on the windows and on the seats.
- Q. Do you sweep it up every day? 40
- A. Every day I must clean it up.
- Q. What do you sweep out, the smoke? A. The soot.
- Q. Where does the soot come from? A. The trains.

- Q.* What is the general color of it? *A.* It is black.
Q. Where does it settle, so far as you have noticed it?
A. On the windows and on the seats.
Q. Can you give any definite idea about the quantity per day that comes in there?

A. As you touch it with your hand, hand full of it; it is impossible to sit down on the seats because it is too dirty.

- Q.* Is that condition true of every day or only once in awhile?
A. When the wind blows from some other direction then it is

10 not so bad.

- Q.* How long have you noticed this condition?
A. The whole six years since I have been there.
Q. What have you noticed about the noise?
A. On Sundays when church service is in progress the noise from passing trains disturbs the service.
Q. In what way does it disturb it?
A. The noise from the engines drowns the service, and when the windows are open the steam and smoke from the trains fills the church.

20 No cross-examination.

KATARINE DZIKIEWICZ, called as a witness by the complainant, being sworn according to law, testified as follows, by Interpreter:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

- Q.* Are you the janitress connected with the school of St. Anthony's Church, located near the corner of Sixth and Brunswick streets, Jersey City? *A.* Yes, sir.

Q. How long?
30 *A.* Since I lived in the school, that is ten years ago, but lately I do not live there, I only go in and out there, that is about three years.

- Q.* You lived in the school ten years, three years of which you have been the janitress?

A. No, I was janitress ten years, the first seven years of which I lived in the school, and the last three years of which I lived elsewhere.

- Q.* Your duties are to keep the schoolhouse clean?
A. Yes, sir.
Q. That consists of cleaning? *A.* Yes, sir.
Q. Sweeping? *A.* Yes, sir.
Q. Washing the windows? *A.* Yes, sir.

Q. You have observed the operation of the railroad immediately opposite the school? *A.* Yes.

Q. What have you observed in connection with the operation of the railroad?

A. Fearful dust and soot from the engines.

Q. How long have you noticed that dust coming from the engines? *A.* Every day; every day.

Q. For how long? *A.* For every day in every year.

Q. Since you have been there? *A.* Yes.

Q. What have you noticed in connection with this dust so far 10 as the schoolhouse itself is concerned?

A. Children when they come in in the morning with clean dresses their clothes get soiled and the parents complain that the school is kept dirty, and the place is dusty; when the children place their arms on the desk they get dirty.

Q. What is it causes the children to get dirty?

A. Just now the windows are fastened, but when the windows are open—

Q. What dust and dirt is it you notice in the schoolroom?

A. Come in through the windows.

20

Q. Where does it come from?

A. As the trains pass by if it happens that the wind blows toward the school, then it blows the dust and smoke into the schoolroom.

Q. Where does the dust and smoke come from?

A. Comes from the trains.

Q. What noise have you noticed there?

A. When the school is being conducted the noise interferes with the instructions, the noise from the trains.

Q. What does that noise consist of?

30

A. As a rule when the cars stop they bump against one another.

Q. That the only noise you have noticed?

A. I also observe that after the children write on the paper after a few seconds the paper becomes black and they have to throw away the paper.

Q. Is that the only noise you have stated you have noticed?

A. That is all; I know also that the sisters complain about the noise.

Q. Is that the only noise you have noticed, the bumping of the 40 cars together, is that the only noise you hear?

A. And the noise from the steam.

Q. When I asked you what noises you heard why didn't you say so—now is there anything else, any other noises?

A. That is all I know.

Q. Have you ever noticed as to whether these noises disturbed the exercises being conducted by the teachers in the school?

A. Certainly, when there is noise they have to stop.

Q. How frequently have you noticed that?

A. Often, when they pass by and stop suddenly, then it makes a noise.

10 *Q.* What do you mean by often, once a year or once a day?

A. About ten times a day.

Q. For how many years past?

A. As I say, I lived there since ten years ago until three years ago; I don't live there, but I go there every day.

Q. How frequently have you noticed the exercises being conducted by the teachers being interrupted?

A. Every day.

Q. For how long a period back?

A. As long as I lived there that has prevailed.

20 *Q.* I show you an envelope containing some substance or other and ask if you ever saw it before?

A. Yes, sir, I did.

Q. What is it?

A. That is dust from the seats taken off to-day.

Q. That is dust taken from one of the seats in the school-house? *A.* Yes.

Q. By you? *A.* Yes, sir.

Mr. Hardenbrook—Offered in evidence by complainant.

30 *Mr. Wall*—Objected to by defendant on the ground that it is incompetent and not within the issues of the case.

Marked Plff's Ex. 20, J. H. C. July 19, 1911.

Q. I show you a piece of muslin and ask you to state what it is? *A.* That is a rag.

Q. Where did you see it and where did you get it?

A. I could not remove all the dust with the brush and I have to use these rags to wipe off the seats with.

Q. When did you use that? *A.* To-day.

40 *Q.* And the substance appearing on that piece of muslin was taken from whereabouts in the school house?

A. From the seats in the school.

Q. The children's seats? *A.* Yes, sir, where the children are seated.

Q. That substance which remained there on the seats was there after you had washed off the seats?

A. No, I brushed the seats with a brush, and then I had to use this rag to clean the seats with.

Q. And the substance appearing on that rag is what remained on the seats after you had brushed them?

A. Yes, sir, I swear that came off the seats.

Mr. Hardenbrook—Offered in evidence by complainant. 10

Mr. Wall—Objected to by defendant as incompetent and not within the issues.

Marked Plff's. Ex. 21, J. H. C. July 19, 1911.

Q. That came off one seat, what size?

A. (As the witness indicates.) About four feet by two feet.

It is consented that the record may read four feet by two feet.

CROSS-EXAMINATION, by Mr. WALL:

20

Q. What kind of a brush did you use in sweeping that seat?

A. A soft brush; the brush alone does not clean off the desk; I have to clean it off with the rag subsequently.

Q. Did all that come from the seat itself or from the arms of the seat?

A. Only from the surface of the seat, just the same as I would wipe off the surface of this desk (indicating).

W. ZAORSKI, called as a witness by the complainant, being sworn according to law, testified as follows, by Interpreter:

30

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. You are engaged in the business of a decorative painter?

A. Yes.

Q. Where? *A.* 9 Quincy street, Passaic, N. J.

Q. And you make a specialty of church and house painting?

A. Yes.

Q. How long have you been engaged in that work?

A. Eighteen years—in this country.

Q. And your home was in Poland before that? *A.* Yes, sir.

Q. And how long were you engaged in that business in Poland? 40

A. Since I was eighteen years old.

Q. Are you acquainted with the school connected with the

Roman Catholic Church of St. Anthony of Padua, located on the corner of Sixth and Brunswick streets, Jersey City?

A. Sure, I remember when it was built.

Q. Have you recently, or have you at any time, made an examination of that building to ascertain its condition as to paint?

A. Yes.

Q. Did you examine the outside of the building?

A. Do you mean the school or the church?

Q. I said school—did you examine the outside of the building?

A. Yes, sir, I did.

Q. Did you go all over it? *A.* Yes, sir.

Q. What condition did you find the outside of the building?

A. Necessary to clean it up and have it repainted.

Mr. Wall—Objected to by defendant.

Q. What condition did you find it in?

A. It would have to be restored to good condition.

Q. Do you know what I mean, what condition did you find it in?

A. I want to find out whether you mean work of art or painting?

Q. I am confining my questions exclusively to painting?

A. It was in very bad state—must be restored.

Q. And when you say very bad state what do you mean, by bad state?

A. Where it is in bad condition, would have to be renovated.

Q. Had it been painted before?

A. I worked several times on it.

Q. Had it been painted before, the outside of the building?

A. Yes, sir.

Q. What condition was the old paint in?

A. Very dirty and covered with soot.

Q. Does the building at the present time require repainting on the outside? *A.* Yes.

Q. Are you familiar with the cost of repainting on the outside? *A.* Yes.

Q. How much is it?

Mr. Wall—Objected to on the ground that it is not sufficiently connected up and of no prohibitive force to introduce the present condition of the school.

Q. Do you know the reasonable cost and value of repainting that school house on the outside at the present time? *A.* Yes.

Q. What is it?

Mr. Wall—Objected to by defendant on the ground
that it is incompetent and irrelevant.

Q. How much?

A. Outside; it cost about \$2,000; I cannot tell you just this
because I have the account in my house.

Q. Have you got any estimates, any accounts with you at all,
about painting anything connected with this church property?

A. No, I have not got anything.

Q. Have you made any estimate of the cost of repainting the
outside of the school? 10

A. That is my estimate, I got no copy (indicating paper in
hands of plaintiff's counsel).

Q. Do you know the reasonable value of painting this school-
house on the outside?

A. Outside from Sixth Street and Brunswick Street, with the
cornices, three times, oil paint, \$720.

Q. Does that include the furnishing of the paint by you, or
just the workmanship?

A. The paint and the workmen.

Q. Have you made an estimate as to the reasonable cost of 20
painting the inside of the school? A. Yes.

Q. What would you say from your experience as a painter
would be the reasonable cost of repainting the interior of the
school?

A. Painting 22 class-rooms, with the windows and doors, \$40
each.

Q. Is that all the inside of the school that requires painting?

A. Hallways and stairways, \$140. 26 rooms in the Sisters'
apartments, \$260; and the chapel in one color, not decorated,
\$60; only one color. Cleaning the floors and washing all the 30
seats off to clean up and remove the old varnish, three times
paint, \$570 for the seats; and clean and revarnish the window
shades, blinds inside, \$146. Total, \$3,046.00.

Q. What is the present condition of the paint work on the in-
side of that school? A. Very dirty, covered with soot.

Q. What is the condition of the desks and seats which you
have reference to inside the school?

A. Very dirty in condition; got to be thoroughly renovated
and cleaned.

Q. What is the condition of the halls and inside walls of these 40
rooms in this school?

A. Very dirty and covered with soot; before paint could be
applied the entire soot would have to be removed and cleaned.

Q. And what is the condition of the ceilings of these various rooms?

A. They would have to be thoroughly cleaned before paint could be applied.

Q. What is the condition? *A.* Black, covered with soot.

Q. Have those ceilings and walls heretofore been painted or papered?

A. Some are coveder with boards, others are covered with plaster.

10 *Q.* Have any of them been papered? *A.* No, sir.

Q. Does this estimate which you have furnished as to renovating the interior of the school cover any room for the cost of cleaning and painting the walls and ceilings?

A. The interior and exterior, covers the whole expense.

Q. The walls and ceilings? *A.* Yes, sir.

Q. Have you very recently gone through the various rooms in the rectory, that is, the house of the Father? *A.* Yes, sir.

Q. How long ago did you do that? *A.* I was there yesterday.

20 *Q.* In what condition did you find the paint work and the paper in the Father's house?

Mr. Wall—Objected to as not connected up; not within the issues, as incompetent and immaterial.

A. I didn't find it very bad and I didn't find it very good.

Q. The portions of it that you didn't find very good, what was the trouble?

Mr. Wall—Objected to as no proper foundation for this witness answering such a question.

A. The work that I did a year ago has got dirty by this time.

30 *Q.* You say it is dirty—do you know in what respect it is dirty; or the cause of the dirt?

A. It is smoky, covered with smoke.

Q. How many rooms in the Father's house did you find discolored in this respect? *A.* All the rooms, the office and other rooms.

Q. And in how many rooms in the Father's house did you find the paint work discolored?

A. The corridor, the hall, would have to be renovated, and the office; I was not through the upstairs rooms.

40 *Q.* Did you renovate the entire house a year ago? *A.* Yes, sir.

Q. And are you familiar with the cost and value of renovating that house a year ago, the reasonable cost of it? *A.* Yes, sir.

Q. Has there been any variation or change in the value or cost of work of that character between a year ago and the present time? *A.* Dearer now.

Q. About how much difference is there in the present cost of doing that work now, and that of a year ago?

A. Last year it cost about \$700; this year it would cost about \$200 more, or \$900.

Q. And that increase is due to the increased cost of material or to the increased cost in wages?

A. Material is dearer and the uniform prices are higher.

10

Q. It is due to both? *A.* Yes.

CROSS-EXAMINATION, by Mr. WALL:

Q. How long ago did you do the school?

A. The first time about five or six years ago.

Q. Have you done it since then?

A. I have to refer to my books; it may be five or six times since then.

Q. Do you mean to say that you have painted the school every year? *A.* Pretty near.

20

Q. You have done about \$2,000 or \$3,000 worth of work in the school every year? *A.* One year I didn't work there; other painters did the work there.

Q. In the last five years did you do two or three thousand dollars worth of work every year except one?

A. Since I worked there five or six years ago, there were other painters worked after me, and then I worked after them.

Q. Did you do the whole school over any time since five years ago? *A.* Others painters, but not I.

Q. So you have not worked on the school for five years?

30

A. I did work, but not quite so much; the priest has my bills.

Q. There are seven or eight families living in the school, aren't there? *A.* I didn't see them.

Q. Isn't a part of the school rented out to families who live there?

A. When I worked there there was only one woman living there.

Q. When did you last work in the school? *A.* Last year.

Q. What did you do then in the school?

A. The floors cleaned and the class-rooms were cleaned and painted; and doors.

40

Q. And that is all you did a year ago? *A.* Yes, sir.

Q. You say you remember when the church was built?

A. Yes, sir.

Q. How long ago was it built? *A.* About sixteen or seventeen years.

Q. What is that, a stone church? *A.* Yes, sir.

Q. Why does the church need repainting if it is stone?

A. Only the woodwork and the paintwork needs painting.

Q. That is a small matter? *A.* That is not a small matter; large matter; it is much trouble to reach the woodwork.

Q. You mean it is hard to paint it? *A.* Yes.

10 *Q.* But there is not much woodwork? *A.* On the top there is so much tin.

Q. But very little woodwork? *A.* Windows and doors, and on top there is a great deal of tinwork.

Q. This estimate you had here to-day, you made that yesterday?

A. This estimate I sent the Father for the school, I guess it is two days ago; two or three days ago.

20 *Q.* Did he give you the job? *A.* No, not yet, it is not accepted; I am going to ask him to-day whether he accept it or not.

Q. Did he tell you to come down here and testify?

A. I came here to get the work, see about it, and to find out whether my estimate would be accepted.

Q. Who told you to testify? *A.* The priest said "If you wish to go to swear to what bills I handed in." The Father has the bills for the work that I have already done in the past.

RE-DIRECT, by Mr. HARDENBROOK:

30 *Q.* I show you a bill of yours dated December 16, 1907, and ask if that is one of your bills for work done in connection with the school? *A.* Yes.

Q. Was this work done at the time the bill bears date or thereabouts? *A.* Yes, sir.

Q. And the items which form this bill was the reasonable cost and value of those services at that time?

A. Yes, it was agreed upon and paid for.

Q. Answer my question? *A.* Yes, sir.

Q. This work that you did at that time consisted in what, one item at a time, what is the first item?

40 *A.* Three class rooms repaired and painted, \$15.00.

Q. Next item?

A. Three class rooms, kalsomined and oil work, \$60.00 One hallway, \$15.00.

Q. The next item? *A.* One room oiled, \$3.00.

Q. The next? *A.* Repaired one wall in one room, \$1.50.

Q. What is the next item? *A.* That is all.

Q. What was the condition of those walls and rooms prior to your doing this work? *A.* Very black and had to be done.

Q. From your knowledge as a painter can you tell what caused this blackness? *A.* Smoke.

Q. Was this bill paid? *A.* Yes, sir.

Mr. Hardenbrook—Offered in evidence by complainant.

10

Mr. Wall—Objected to by defendant, as no proof to show how long a period had elapsed before this work was made necessary or how long had elapsed since the previous work was done.

Marked Plff's Ex. 22, J. H. C., July 19, 1911.

Q. I show you another bill of yours dated November 29, 1910, and ask you what that work is that appears on that bill?

A. Painting in the Rectory. Father has got all the bills; I cannot tell just what this is for, I have not the items.

Q. It is work done for the rectory and school together? 20

A. Yes; rectory more this time.

Q. Do you recall what work it was which you did in the rectory and school in this month of November, 1910, for which you rendered this bill of \$461.00?

Mr. Wall—Objected to as not the best evidence.

A. I cannot tell; I have my books at home; I could tell by my books.

Q. It was exclusively painting, whatever it was.

A. Yes, only painting.

Q. You don't do anything else but painting? *A.* No. 30

Q. Do you do any repair work, plaster?

A. No, sir. No other work of any kind.

Mr. Hardenbrook—Offered in evidence for identification by complainant.

Marked Plff's Ex. A for Iden. J. H. C., July 19, 1911.

Q. I show you a bill dated September 5, 1909, for \$278.33, and ask you if you will kindly look at that bill and state what work is specified in that bill there in the Polish language?

A. Contract for painting work in the church for \$135.00. 40
Ten days work of myself, and an extra man 12 days, and another man twelve days, 34 days in all, at \$3.28 a day, \$111.52.

Q. That was for work done in the church? *A.* Yes, sir.

Q. The entire work called for by this bill of September 5th, is for work done by you in the church, is it not? *A.* Yes, sir.

Q. And the prices as charged in this bill are the reasonable prices and the reasonable value of the services and materials at that time? *A.* Yes, sir.

Q. Can you recall what work it was in the church which you did for which you rendered this bill?

*Mr. Wall—Objected to by defendant; the bill speaks
10 for itself.*

A. I cleaned the walls and kalsomined them over and the ceilings.

Q. What was the condition of the walls and ceilings which were re-kalsomined and painted as appears to be charged for by this bill at the time you did this work?

A. They were very bad, had to be renovated.

Q. What do you mean by bad? *A.* They were very dirty.

Q. From what cause do you know, what kind of dirt was on it? *A.* All covered with soot; had to be cleaned.

20 Q. This bill was paid by the church?

A. The priest paid it.

Mr. Hardenbrook—Offered in evidence by complainant.

Marked Plff's Ex. 23, J. H. C., July 19, 1911.

Q. This bill which I have just shown you contains an item of \$135, what is that for?

A. That is the woodwork and varnish.

Q. In the church? *A.* Yes.

Q. What was the condition of the woodwork at the time you 30 did that work? *A.* Black.

Q. From what cause so far as you know?

A. All the varnish was black, dirty, must be cleaned.

Q. From what cause was it black?

A. From smoke, from dust.

Q. There is another item here of \$23.62, what is that for on this bill?

A. That is material.

Q. Is this item of \$23.62 for material a reasonable charge for the material at that time, value of the material at that time?

40 A. That was money I advanced for material.

Q. Please answer my question? *A.* Yes, sir.

Q. Another item of \$8.19, what is that for?

A. That was for expressage of paper and the paper which had

to be used on the walls, part of the walls which were very dirty.

Q. Is this charge a reasonable charge for that material at that time? *A.* Yes, sir.

Hearing adjourned to July 25, at one o'clock.

United States Circuit Court, District of New Jersey.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, <i>Complainant,</i> <i>vs.</i> THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant.</i>	10
	Testimony.

Hearing in the above-entitled matter, held before Hon. George R. Beach, Special Examiner, duly appointed by order of the Court, at his office, 75 Montgomery street, Jersey City, New Jersey, on the 25th day of July, nineteen hundred and eleven, 20 at ten-thirty A. M.

Appearances—Mr. FRANK M. HARDENBROOK, of counsel for complainant; Mr. ALBERT C. WALL, of counsel for the defendant.

FRODE C. W. RAMBUSCH, being duly sworn according to law, on his oath, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Mr. Rambusch, you are connected with the Rambusch Dec-
orating Company, of No. 2 West 45th street, New York City, 30
you not?

A. Yes, sir; I am the senior partner.

Q. And how long have you been a member of that firm?

A. Thirteen years.

Q. And what is the general business of that firm?

A. Artistic decorations; specialty, churches.

Q. And during the past thirteen years, will you state about how many churches your firm has decorated, roughly speaking?

A. I made a change in my firm, and took in a partner; altogether, I have decorated about one hundred and twenty-five 40 churches in Canada and the United States.

Q. In the past thirteen years?

A. No, that is a little longer; I connected myself with my

present partner thirteen years ago; altogether, I have decorated about one hundred and twenty-five churches and chapels; probably done more than any other firm in the United States, in Canada and the States.

Q. Did you personally make an examination of the Roman Catholic Church of St. Anthony of Padua, at Sixth and Monmouth streets, Jersey City? *A.* I did.

Q. When did you make that examination, Mr. Rambusch?

A. I think about two weeks ago.

10 *Q.* How extensive an examination did you make at that time?

A. I went through all the rooms connected with the church, looked at the ceilings and walls, at the altars, and stations, and so forth.

What condition did you find the portions of the church you personally examined, to be in?

A. I found everything soiled by smoke, and especially what had suffered most was the altars and stations, the artistic work in the church and the other rooms connected.

Q. Will you kindly specify what you mean by "Stations"?

20 *A.* They are called the Stations of the Cross, fourteen in number, relief ornamentations, measuring from three feet, relief work; it is something that they have in all Catholic churches in the world; they represent the sufferings of our Lord from the

time he was condemned by Pontius Pilate until the Resurrection; that is in all Catholic churches, a necessity that they have to have, a part of the devotions connected with it.

Q. Could you give some idea as to what extent the portions of the church which you examined were discolored by smoke?

A. To what extent—what do you mean by that?

30 *Q.* Was it slight, or very much? *A.* It was badly damaged.

Q. Badly? *A.* Badly damaged.

Q. You mean by that?

A. I mean by that that the smoke that comes from the railroad, the soft coal smoke, that will settle, a black substance on everything, on the ceiling and walls, but especially on everything that is done in relief work, as we called it, and modelled—relief, ornamentation or figures, images.

Q. Is that the condition in which you found the portions of this church which you examined?

40 *A.* Yes, sir; and I also furthermore can state that that cannot be washed off; it is bound to look very dirty and disgusting, unsuited for a church, and that has to be done over very frequently.

"Did you at any time decorate this church?"

A. Yes, I decorated it for the Reverend Father Kwiatkowski, I cannot tell—nine or ten years ago; I think it is ten years ago; and after a while when I came over, passing, as I always do, examine the condition of work that I have executed, I found it entirely ruined by the same black smoke, and it was so badly ruined that the decoration had to be all done over in a plain color, whitewashed. It was ruined and soiled to that extent that all the fine color shades were almost invisible, instead of showing that fine color harmony, it showed a dirty, disagreeable surface that did not present itself respectfully; it lost that decorative and handsome look, all caused by the settlement of the smoke, and the rector had it all done over simply painted all in white in order to have it look clean and respectful; in other words, the ornamental work that he had paid me for was entirely ruined, and in order to make his church look respectful he had it painted in white. 10

Q. What was the fair and reasonable value of the decorations which you made in this church some nine or ten years ago when you made them?

Mr. Wall—Objected to by defendant as not the best 20 evidence.

Q. What was the reasonable value of the work which you did nine or ten years ago? A. About fifteen hundred dollars.

Q. Is that for the white washing?

A. No, that was for the decorations that were on there before.

Q. Did you do this white painting?

A. No, the people don't come to us for such work; they can have that executed by others; that does not take any artistic ability.

Q. Since the time you did these decorations, the church has 30 been enlarged to some considerable extent, has it not?

A. Yes, sir.

Q. What would you consider necessary to be done to that church in the way of decoration at the present time?

Objected to by defendant.

A. Well, the two sacristies, hallways, vestibules, chapel and entire church proper—

Q. Have you prepared an itemized statement of the work which you examined and found necessary to be redecorated?

A. I have, sir.

Mr. Wall—Objected to as too indefinite and irrelevant. 40

Q. State, Mr. Rambusch, from your examination which you made of the church, what you consider necessary to be done to it at the present time?

Mr. Wall—Objected to by defendant, as the standard laid down by the question is a standard which has no bearing or relevancy to the defendant's liability.

A. To do the church and connecting rooms, do ceilings, walls, woodwork, put it in good condition, remove all dirt from the woodwork, etc., repaint walls and ceilings, and fix up the altars

10 and stations, and decorate the church in a suitable manner, to compare with other decorations in similar churches, I figured it would amount to six thousand and some hundreds dollars; I don't remember the exact figure.

Q. My question more particularly was as to what work in the church you found from your investigation and examination was necessary to be done?

A. I found it all necessary to be done, because it was all smoky, all smoked up and in bad condition, but especially the altars—they are very large, the main altar and the two side altars,

20 and also the stations and statues, although some of them have been done over very recently.

Q. Do you consider a figure of six thousand and some hundred a fair and reasonable price for the value of the work necessary to be done? *A.* I do.

Q. And do you base that estimate, Mr. Rambusch, or do you take into consideration in making that estimate of the cost, the character of the church and the parishioners to any extent?

A. I don't understand quite what you mean by that—do you mean that the parishioners may not be very refined people?

30 *Q.* Would decorations costing that amount of money be extravagant and inconsistent with the kind and character of this church?

A. No, we decorate churches up to fifteen thousand dollars (\$15,000.00), for the interior decorations, which does not include relief work; woodwork, all woodwork, and that, is taken in.

Q. In determining on the kind and character of the decorations that the church needed, you took into consideration the character of the church and the parishioners?

40 *A.* We have submitted a sketch that shows the character of the work; that is based on what is considered proper in a general way; not extravagant and not the cheapest kind of work; just in a fair, every day line of good work.

Q. From your knowledge of work of this character, what would you say would be a reasonable time that decorations should stand?

A. The decoration of a church takes between eight and twelve weeks; it sometimes takes more, and sometimes in less time, under special circumstances, but in a general way between eight and twelve weeks.

Q. That is to do the work? *A.* Yes.

Q. And after the work is done, under ordinary conditions, how long should the work stand, under such conditions?

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Mr. Wall—Objected to by defendant as incompetent, no qualification.

A. I have done work eighteen years ago that is in almost perfect condition; where the air is clean and good it ought to last about thirty-five years; I can mention a number of churches which can be examined where the decorations lasted that long.

Q. You may mention those?

Mr. Wall—Objected to by defendant, as the conditions are so various that they furnish no criteria from which any conclusion can be drawn with reference to 20 the case in hand.

Q. Mention those churches.

A. The lasting quality of work depends upon the purity of the air; in this church up there the decoration that I did for Father Kwiatkowski was ruined in a few years.

Q. You may mention, if you will, subject to the objection of counsel, such churches where the decorations have stood for that number of years.

Same objection.

A. We decorated here a couple of years ago—

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Question withdrawn.

Q. Did you make a memoranda of the exact cost of these decorations at the time you made that examination?

A. No, I have not.

Q. Did you make a memoranda of the cost of these decorations?

A. I think we can look it up but I have not got that here.

Q. I asked if you had made such memoranda?

A. I believe so; it must be in our books.

Q. I show you a paper and ask you if that is the memoranda 40 which you prepared and that you refer to? *A.* Yes.

Q. And by looking at that paper does that refresh your recollection as to the exact amount of the cost of this work?

A. Yes, sir.

Q. Will you kindly look at that paper, and, after having refreshed your recollection from it, state what the cost of those decorations will be?

A. Mr. Wall—Objected to by defendant as incompetent, not properly proved.

Q. What is the figure there, what is the cost?

A. \$6,465.00.

Q. Those figures which appear in that paper, from which you have refreshed your recollection, are your own figures, are they not? *A.* Yes, sir.

Q. In your own handwriting?

A. The handwriting of my partner, to be exact.

CROSS-EXAMINATION, by Mr. WALL:

Q. What were your instructions in making this examination of the church which you made recently, Mr. Rambusch?

A. Father Kwiatkowski telephoned to us that he wanted an estimate on the church, as he contemplated having it re-decorated; that is the reason I went over and looked it over; not finding himself at home, I spoke to his assistant.

Q. Did you know of the pendency of this suit in which he is asking damages from the railroad company?

A. I cannot recollect; I believe it was mentioned to me. Yes, I remember he mentioned to me there the fact that the church was in bad condition, had been smoked up by the Pennsylvania Railroad passing the door, and he intended to have it redecorated.

Q. I asked you whether he mentioned to you, or whether you knew of these legal proceedings, this lawsuit being pending; that is, the lawsuit being in course of trial?

A. I did know that he had trouble with the railroad; that was mentioned there.

Q. Did anybody bid or put in a competitive bid against you?

A. Of that I have no knowledge whatsoever; I stuck strictly to my business, did what I was asked to, and others did not concern me in the least.

Q. Was anything said about the price at which you were to put in your bid, whether you were to bid high, or bid low, or anything like that? *A.* No.

Q. Nothing was said?

A. No, the only thing at all of that kind that was said was by

his assistant, that he thought that Father Kwiatkowski wanted a good job; that was all that was said.

Q. You were not limited in any way as to expense as to what was to be done?

A. I was asked to give a price at which I would put the church in good condition, and I do not know if I had one or twenty competitors; I wanted to get the work, and I put in a price accordingly.

Q. But as to the amount of work that was necessary to put the church in good condition under the terms of your employment you were the sole judge of what was necessary to be done, that right? *A.* Yes, sir.

Q. Now, was this decoration that you advised on this visit about two weeks ago, was that decoration of the same character as the decoration actually performed there by you some nine or ten years ago?

A. No, it was of a higher standard, because the first time the rector was very much humbled by poverty; he did not have the money to carry out the work as he wanted to, and a great many things were left out.

Q. You say, humbled by poverty—as rector, or by individual poverty?

A. As rector, I should say; I do not know anything about his individual affairs; it is the same thing always, if you permit me to say it; when they build a church they are hard up for money, it takes so much, and the first time they decorate they want to do it as inexpensively as they can, and after a few years if they are better off they want it executed as it ought to be.

Q. Now, then, did you render any bill for this work some nine or ten years ago?

A. Yes, but there were many extras, and it was a mixed up affair; he wanted a little more here, a little less; it was indefinite.

Q. But you rendered bills for everything that you did nine or ten years ago? *A.* I am quite sure of it.

Q. Those bills are in writing? And they aggregate the sum of \$1,500.

A. That is to my best knowledge; it may be more and it may be less, but I am saying that it is to my best knowledge.

Q. Now, then, you spoke of those Stations of the Cross and started to give the measurements of those?

A. They are only approximate; I don't know exactly.

Q. How high are they?

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A. About three feet wide, I should say about five feet high

Q. And they are made of what? *A.* A composition.

Q. Terra cotta? *A.* Yes, or different materials, composition

Q. They are traced out? *A.* Yes, or cast, one of the two.

Q. And what do they cost before they are painted or decorated?

A. That varies very much. If you go over in Barclay street you may go to a cheaper house and they will charge you \$250.00, and to a better house, for stations of the same size they will

10 charge you two or three times the amount.

Q. Where did you go to get these particular stations that you put in? *A.* I didn't put them in.

Q. You don't know the value of stations?

A. I do; if I see a special kind I can tell you pretty much what they are.

Q. But your business is more the decoration of them after they are put in?

A. Yes, to decorate them, religious paintings, etc.

20 *Q.* That is, you have to decorate them in accordance with the history of the times and have things chronologically correct?

A. Yes, sir.

Q. And you don't mean that these Stations of the Cross themselves; that is, the figure, is injured by smoke or dust?

A. No, I don't.

Q. That is just as good as it ever was?

A. Yes, when it is redecorated.

Q. You are talking about the decoration?

A. About the surface treatment, paint, gold leaf, fresh colors of the garments—the cast itself, the relief itself, is as good as 30 ever; it is the finish that is ruined.

Q. Now, in this gold leaf—you figured gold leaf in making this estimate? *A.* Partly gold leaf and partly aluminum.

Q. Is it real gold leaf? *A.* 23 karat gold leaf:

Q. Absolutely? *A.* Absolutely 23 karat gold leaf.

Q. And that, of course, would not be affected by smoke or dust?

A. There is nothing that would be more affected than that.

Q. Can't wipe it off?

A. No, sir; never was a man born that could; the gold leaf, 40 pure gold leaf, it is so thin that even if you were to rub it with your hands you would rub it through, spoil the brilliancy of it, and secondly the smoke will absolutely ruin it.

Q. Is that true, that you can rub off gold leaf after it has been put on?

A. That is a well-known fact, that if you roughly rub it with your hand you can rub or put your hand through it.

Q. I didn't put in the word "roughly"; my question now is, that if you have put on gold leaf of 23 karat fineness, which is the kind of gold filling that dentists use in people's teeth, if you put that gold filling on a wooden image or terra cotta or composition, and dust and soot settles on that gold filling, do you mean to tell me that you can't—not roughly, but delicately and scientifically and proper fashion—take off that soot and dust without destroying that gold filling? 10

A. That is what I mean to tell you.

Q. You do? *A.* Exactly.

Q. Then you say it is an impossibility to restore a fresco in the city of London, which has gold leaf on the frescoing?

A. If it is done, it is what is called burnished gold.

A. I didn't ask you how, I asked you if you could or if it was an impossibility?

A. You may tell me what it is you want the question about; 20 there are two different kinds of gilt; that in frames, burnished gold, that can be cleaned; but regular plain gold leaf gilding cannot be cleaned; I cannot give you only the real facts about it.

Q. You have been abroad? *A.* Yes, sir, certainly.

Q. Have you been in London?

A. No, I have not; I have not been in Great Britain; otherwise, Italy, Norway, Sweden, France, Africa, almost everywhere else.

Q. Have you been in Pittsburgh?

A. Yes, doing work there now, outside of Pittsburgh just now. 30

Q. You understand that although you have not been sworn that you are to swear to all this testimony?

A. I certainly do; nobody had told me; I presume that; it does not make any difference to me.

Q. You understand that you are practically under oath?

A. I understand that.

Q. Now you want your testimony to stand to the effect that if gold leaf is used on wood, that it is an impossibility, if smoke or soot comes in contact with that gold leaf, to wipe the gold leaf clean? 40

A. And leave it in the same condition as before.

Q. That is your testimony?

A. Yes, sir; in every case there are always degrees.

Q. I asked you to cover every case. Now then, how much larger is the church now than it was when you decorated it before? A. I do not know exactly; I think double the size.

Q. And your price for decorating being four times your previous price—your previous price being \$1,500 and your present price \$6,000—the difference in decorating for the two jobs would correctly be represented by about \$3,000, that right?

A. No; you put that question in a way I hardly know how to answer it; before I decorated the ceiling and walls; now, altars 10 and stations, pews and all woodwork in the church and chapels and vestibules, in the sacristies, etc., and that makes a great deal of difference.

Q. Now, if you did the same kind of a job in the church that is double the size that you did ten years ago in the church, same as it was then, it would cost about \$3,000, wouldn't it?

A. Yes, about; yes, sir; but remember the stations, altars, etc., were not included in that, but they are included in this estimate.

Q. Now you say that everything was soiled by smoke, where 20 do you live, Mr. Rambusch?

A. I live over in Brooklyn, Bay Ridge, Brooklyn.

Q. Do you mean to say that there was no other agency that contributed to the work there except smoke?

A. No, I don't want to say that; age always adds to it.

Q. Age? A. Age.

Q. And gases in the air that disintegrate painting and frescoes? A. I didn't see any marks of that, but in a general way, I will presume, as my experience tells me, that gases of course add to the destruction of any decoration if it is not properly taken 30 care of.

Q. You don't mean to say that dust and dirt did not aid in the destruction which you found there—I mean dust and dirt not emanating from the railroad company?

A. I certainly cannot tell you.

Q. You don't know?

A. I find there is a layer of soot or smoke that has ruined everything, especially all that was relief work; all the stations and woodwork and everything else. I cannot state where every little molecule of dust comes from; that is out of my line.

40 Q. Now, isn't it customary for a good many churches to have the images painted white?

A. Not white; that is unusual; very few cases; they are done in light colors, tinted with gold.

Q. How long ago did you see them after you decorated them nine or ten years ago?

A. I cannot tell you; because I make it my business, if I accidentally go to a certain place where I have done work I step in to see how my work looks.

Q. Have you studied this subject of decoration, and the effect of time and atmosphere and gases upon the life of the decoration?

A. I should say so; I have been in this business for several years.

Q. Yes, or no? *A.* Yes, I have.

Q. Have you studied it with reference to the conditions in Pittsburgh?

A. Yes, sir, I have, because I estimated on churches there.

Q. And you know nothing whatsoever as to conditions in London?

A. I have heard reports; workmen who worked for me have worked in London.

Q. But you don't know anything by study?

A. Not by my own experience; I have read, of course, in the papers, but from personal observation I can give no report as to conditions in London.

Further hearing in this matter adjourned to July 31st, 1911, at ten-thirty A. M.

Circuit Court of the United States, District of New Jersey.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, <i>Complainant,</i> <i>vs.</i> THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant.</i>	}
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Testimony taken in the above-entitled matter, before Hon. George R. Beach, Examiner, duly appointed by order of Judge Joseph Cross, at his office, 75 Montgomery street, Jersey City, N. J., on the 31st day of July, 1911, at ten-thirty A. M.

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Appearances—Mr. FRANK M. HARDENBROOK, of counsel for complainant; Mr. ALBERT C. WALL, of counsel for defendant.

SISTER MARY HORTULANA, called as a witness by complainant, being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Sister, you are connected with the school of the Roman Catholic Church of St. Anthony of Padua, located on the corner of Sixth and Brunswick streets, Jersey City? A. Yes.

Q. How long have you been connected with that school?

A. Here in Jersey City? St. Anthony's school?

10 Q. Yes? A. Three years it will be next August.

Q. Next month? A. Yes.

Q. And in what capacity—what are your duties there, your position? A. Teacher.

Q. Are you the head sister in charge of the school?

A. Yes, I am the head sister, in charge of the school.

Q. And have you been the head sister in charge of the school for those three years? A. Yes.

Q. About how many pupils are there there?

A. Over eleven hundred.

20 Q. Do you know the location of the Pennsylvania Railroad opposite the school, across the street from Sixth street?

A. Yes, sir.

Q. Where is your home? Where do you live or make your home—in the school?

A. Our house is right connected with the school.

Q. There is a sister house connected with the school?

A. With the school, yes.

Q. How far distant? A. It is in the same building.

Q. In the same building? A. Yes.

30 Q. A portion of the school building which is devoted to the home of the sisters? A. Yes.

Q. About how many are there? A. You mean last year?

Q. Yes? A. Nineteen sisters.

Q. They are teachers, are they not?

A. Seventeen teachers, and two sisters are in the house.

Q. You have observed the operation of the Pennsylvania Railroad? A. Yes.

Q. What have you noticed in relation to the operation of that road since you have been there—state it in your own way?

40 A. I have noticed a big noise and smoke.

A. Now, take up one of these elements at a time—what have you noticed as to noise?

A. I know I have to speak louder in the school than I ever did anywhere else.

Q. What are the noises which you have noticed?

A. Well, exhausting the steam puffing of the engines, rattling of the wheels.

Q. Any whistling or ringing?

A. Yes, whistling and ringing of bells.

Q. How frequently have you noticed that during the past three years?

A. I noticed that every day and more than once, too.

10

Q. And how is it in the night time, do you notice it at night?

A. Yes.

Q. The same as in the day time?

A. I couldn't say that exactly, because I am asleep; but I notice several times I am wakened up by the noise.

Q. How frequently has that occurred—about, give some rough estimate?

A. I couldn't say exactly; about five or six times in the night, during the night.

Q. Every night? *A.* Yes.

20

Q. And that has been so for the past three years?

A. For the past three years.

Q. You spoke of having to speak louder to the pupils than you have had occasion to do elsewhere—do you mean in other sections, other schools in which you have taught? *A.* Yes, sir.

Q. Is the noise of an extent sufficient to interfere with the school exercises in so far as you have observed?

A. Yes, sometimes I have to stop the lessons, and if the child had a weak voice I could not hear the child at all, have to go near the child.

30

Q. How frequently have you noticed that in the past three years? *A.* That happens every day and more than once.

Q. You spoke of smoke, what have you noticed in connection with the emission of smoke? *A.* I notice that when the children come to school in the morning they are clean and have clean clothes on, and after they leave the school they are dirty with the smoke, and the smoke spoils the furniture, charts, maps, desks, tables, everything in the school room.

Q. Have you ever observed this smoke coming from the engines of the Pennsylvania Railroad?

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A. Yes, and when the smoke comes right into the room the whole class is disturbed, the children have to close their eyes, take their handkerchiefs and try to wave the smoke away from their

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eyes, and several times the sisters have had trouble with the children getting dust into their eyes.

Q. How frequently have you observed the smoke coming in through the windows? Into the room?

A. I could not say exactly, but almost every day.

Q. Not every day—you say almost every day?

A. I could not say exactly because I never gave attention to that.

Q. I beg your pardon? *A.* I never give attention to that.

10 *Q.* What effect have you noticed this smoke had on the interior of the school house?

A. I notice that it spoils everything; everything is dirty and blackened by the smoke.

Q. Can you designate?

A. The walls and furniture, charts, maps.

Q. Have you ever noticed any accumulation of the substance, this smoke and dust, in the school rooms? *A.* Yes.

Q. How frequently have you noticed it? *A.* Every day.

Q. What is the relative approximate ages of the children?

20 *A.* From five up to thirteen years.

CROSS-EXAMINATION, by Mr. WALL:

Q. How many pupils did you have, Sister, when you first came there in the school? *A.* Something around nine hundred.

Q. Now, did you mean to testify that you didn't get used to this noise at all so that you have never slept through it at all?

A. No, I never slept through it.

Q. Every time there is a noise on the railroad it wakes you up?

30 *A.* I don't know every time, but I wake up five or six times every night.

Q. Every night? *A.* Every night.

Q. Do you mean that for every night during those three years you woke up five or six times because of the noise from the locomotives and cars? *A.* Yes.

Q. Are you particularly nervous? *A.* That I do not know.

Q. Is your health good, Sister?

A. I do not answer that question; I do not know.

40 *Q.* I mean that people usually get accustomed to a noise that comes frequently, and my thought was that if wakened you up four or five times a night during three years, for every night during that three years, it might be that you were unusually nervous in your disposition; what have you to say to that?

A. I do not have any answer to that; I know I have been to the doctor, but I never have been examined for that, nervousness.

Q. Sometimes it is the whistling that awakens you?

A. No, not the whistling, I don't remember.

Q. What is the noise that awakens you?

A. Bumping the cars one against another, exhausting the steam.

Q. Those two things are the things that you refer to as waking you up four or five times a night every night for three years? 10

A. Yes.

Q. Did you mean that the children got cinders in their eyes—is that what you meant?

A. The dust that comes from the engine; I know that because I saw the smoke and the dust rush right into the room through the open windows.

Q. That doesn't happen every day, does it?

A. No, I said several times.

Q. In the last three years? *A.* In the last three years.

Q. Is this a pay school—do they pay, the pupils? 20

A. Who pay?

Q. The pupils? *A.* Yes.

Q. The school has been a successful school; it has grown?

A. Yes.

Q. Successful? *A.* Yes.

Q. Is it about to be enlarged; do they talk about enlarging it, making it bigger? *A.* Yes.

Q. The intention is to enlarge it in the near future?

A. Whose intention?

Q. Whoever has the say about it? *A.* That I don't know. 30

Q. Haven't you urged upon the priest and upon the persons that have control of the school, that the school ought to be enlarged, to take care of the pupils? *A.* I never spoke about that.

Q. Never heard anything about that?

A. Never heard or never spoke to anybody about that.

Q. Then there hasn't been any talk about enlarging the school?

A. No.

Q. I understood you to say some time ago that there was some talk about making it larger, to accommodate more pupils; there isn't anything of that kind? *A.* Not that I know of. 40

Q. Is the school at its full capacity now? *A.* Beg pardon?

Q. Has the school got all the pupils it can take care of now—do you understand my question, Sister? *A.* No, I don't.

Q. Is there room in the school for more than eleven hundred pupils?

A. We have one class empty that we could have children in it.

Q. Where did you teach before you taught in that school?

A. In different places.

Q. What place before you taught there? *A.* Boston, Mass.

RE-DIRECT by Mr. HARDENBROOK:

10 *Q.* You were asked by counsel on cross-examination in reference to whether these children paid, or whether their parents paid for their tuition, what arrangement is there existing as to these children paying, or their parents paying for their schooling?

A. Do you mean how much do they pay?

Q. Yes, what is the arrangement?

A. One child, pays fifty cents; two children, eighty cents; three children, \$1.00 a month, and four and five is the same, a dollar a month.

Q. Those are monthly charges? *A.* Yes.

20 *Q.* And what is the custom, or is there any custom in relation to children whose parents and guardians are too poor to pay anything?

A. I don't know anything about that, because we do not collect the money.

Q. Beg pardon?

A. I don't know; we do not collect the money.

Q. The money is paid into the trustees of the church itself, is it not? *A.* Yes.

30 W. ZAORSKI, having been heretofore sworn, testified as follows: Continuation of direct examination. Andrew Sandwich, interpreter.

By Mr. HARDENBROOK:

Q. At the last hearing at which you testified, you were asked to produce your books in reference to painting and decorating, which you had done on the church and school and rectory of St. Anthony's Church? *A.* Yes.

To the Interpreter:

Q. You understand the Polish language? *A.* Yes, sir.

40 *Q.* And you are now interpreter connected with the Second Criminal Court in Jersey City? *A.* Yes, sir.

Q. About how long? *A.* Since January 20, this year.

Q. Were you ever interpreter anywhere else?

A. About nine year ago, for the Standard Oil Company.

By Mr. WALL:

Q. Did you act as interpreter in these smoke cases in the Second Criminal Court? *A.* I only had one man there.

Q. You don't go to this church, do you?

A. No, I don't go there.

Q. You a Roman Catholic? *A.* I am a Greek Catholic.

Resumption of testimony of witness ZAORSKI.

10

By Mr. HARDENBROOK:

Q. Have you produced your books of original entry showing the work which you did in this church and school and rectory?

A. Yes.

Q. I call your attention to a bill which has been introduced in evidence and marked Plaintiff's Ex. A for identification, in which there is a charge of \$461.00, I will ask you if you have the original entry in your book of the items constituting this \$461? *A.* Yes.

Q. Will you please state, enumerate what work was done, and where it was done, which constituted in the aggregate this sum of \$461.00?

<i>A.</i> School kalsomining,	\$16.00	
Oiling,	7.00	
Varnishing,	7.00	
Rectory, oiling,	160.00	
Decorating,	140.00	
Another private room, decorating,	45.00	
School again, three class rooms,	45.00	
Rectory again, kitchen washed and painted over,	12.00	30
Front door, outside, had to wash it, clean it off and varnish it,	10.00	

Q. Those other rooms, what was done to them?

A. The rest was all decorating, cleaning and varnishing, taking down old canvas and putting on new canvas. Rectory again, tearing down the old canvas and putting on new, and varnishing, \$19.00. I didn't get paid for the bill of wall paper, \$123.00.

Q. Where was that paper put? *A.* In the rectory.

Q. This work was done when, September, 1910? 40

A. It was before that.

Q. Covering what months? *A.* July and August.

Q. What was the condition of the old walls and different

portions of these buildings which you renovated and redecorated at the time you did this work?

A. They were dirty, black, and cracked, different parts.

Q. You mean the plastering was cracked? *A.* Yes.

Q. What was this dirt which was on the walls?

A. Like little lumps of coal, black dust.

Q. How much of this work of which you have given us the items, or this bill rather, is the charge for repairing the cracks in the plastering? *A.* We were doing that all as one job.

10 *Q.* Did you have a contract for so much for the entire job, including the repairing of these cracks in the plaster?

A. That was all in one job? All in one bill.

Q. I know, but how much of that bill is charged for repairing cracks?

A. I didn't put it down extra; where it was cracked, that is, where I put the canvas over.

Q. Then the cracks were not repaired by you? *A.* No.

Q. Can you give any estimate as to how much of this bill should be charged off for repairs to plastering?

20 *A.* About ten dollars.

Q. Have you in your book any record of any work being done to the school or rectory or church in February, 1907?

A. No, I have not; I have got it, but I have not got the book here.

Q. Look at that and state whether or not that is in your handwriting? *A.* Yes.

Q. Is that an account or a record of the work which you did in the school and rectory and church in 1907?

(Witness is now referring to the bill and not to the

30 book.)

A. Yes.

Q. State what work you did in the church and school and rectory in February, 1907?

A. Cleaning and canvassing in rectory, \$75.00

Papering, 12.00

Mr. Wall—Defendant objects to witness reading from the bill as not being the best evidence.

A. Dining room, painting, cleaning, \$30.00

Putting on wall paper. 8.00

40 Library, painting, 30.00

Papering, 8.00

Q. Where is this, in the school, or what? *A.* Rectory.

A. Bedroom, painting,	\$8.00
Floor, oiling,	15.00
Small office,	14.00
Pantry,	3.00
Closets and varnishing around stove,	2.00
Two corridors and painting woodwork,	8.00
Papering and fixing up room,	6.00
<hr/>	
Total,	\$219.00

Q. Did you personally do any portion of this work? A. Yes. 10

Q. And were you present when all this work was being done?

A. Yes.

Q. And are the amounts charged for the various items of the work a reasonable and fair charge for the work at that time?

A. Yes, reasonable.

Q. Do you know of your own personal knowledge that these various items of work done, which you have just enumerated as being done in February, 1907, was actually done and performed?

Mr. Wall—Objected to by defendant as not the best evidence; witness has read from the bill, and not refreshed his recollection from any memoranda made at the time, and has no independent recollection. 20

A. I do.

Q. I call your attention to the date of April 12, 1907, and ask you if you did any work at St. Anthony's Church at that time?

A. Yes.

Q. Did you personally do the work or oversee the work being done at that time? A. Yes, I was working on that.

Q. Have you any entry in the book which you have here with you of any work at that time? A. No, I have not. 30

Q. Have you any personal recollection as to the work which was done at that time? A. I don't recall it.

Q. I show you what purports to be a bill of yours and ask you if that is in your handwriting?

Mr. Wall—Defendant objects to exhibition of bill to witness; the bill shows a bill for work, and the witness has said he has no independent recollection of it.

A. Yes, that is mine.

Q. I ask you whether or not this bill which I have shown you would refresh your recollection as to the amount and kind and character of the work which you did April 12, 1907, does this bill refresh your recollection? A. Yes. 40

Q. I now ask you to look at this bill and refresh your recollection, and having refreshed your recollection, then testify as to what work was done at that time?

Mr. Wall—Defendant objects to the use of the bill and the inspection of it by witness; it is not shown yet that the witness has a right to consult it as a memoranda to refresh his recollection.

Q. Does that bill refresh your recollection? *A.* Yes.

Q. Since having refreshed your recollection now testify; state **10** what work you did at that time?

A. Beams and walls, cornices in the church, St. Anthony's Church, scraped down the old painting and put on new.

Q. What was a fair and reasonable charge for that work?

A. \$168.00.

Q. Is that all the work you did at that time?

A. We had to clean off the stations of the cross.

Q. What was the condition of the portions of the church which you have just testified you redecorated and cleaned?

A. Dirty.

20 *Q.* Dirty from what, if you know?

A. It was black dust and soot.

Q. How long have you been in the business of a decorator?

A. Eighteen years.

Q. Doing considerable work in Jersey City during that time?

A. Yes.

Q. Do you make any specialty of any kind of work?

A. Decorator, that is all.

Q. Any particular kind of buildings or anything of that kind?

A. Yes.

30 *Q.* What? *A.* Pictures of all kinds; portraits, artistic work.

Q. Any particular kinds of buildings?

A. Anything comes along.

Q. Have you recently examined the interior of the school building of St. Anthony's church, on the corner of Sixth and Brunswick street? *A.* Yes.

Q. In what condition did you find it? *A.* It has got to be overhauled and cleaned up.

Q. What is its present condition? *A.* Dirty, dusty.

Q. From what? *A.* Kind of black dirt and dust.

40 *Q.* Have you prepared an estimate of the amount of work necessary to be done to put the school in proper condition?

A. Yes.

Q. And have you made an estimate of the cost of the various work necessary to be done? *A.* Yes.

Q. I show you a paper and ask you if that is in your handwriting? *A.* Yes.

Q. And is that the estimate which you prepared? *A.* Yes.

Q. Is that a fair estimate as to the quantity of work necessary to be done? *A.* Yes.

Q. And are the prices enumerated and set forth in this estimate a fair and reasonable price and charge for the work as therein enumerated?

Mr. Wall—Objected to by defendant as incompetent and not the best evidence. 10

A. That is as cheap as I can make it.

Said estimate offered in evidence by complainant.

Objected to by the defendant as vague and uncertain, not relevant, not the best evidence and incompetent.

Q. I ask you to read from this estimate, which is in the Polish language, what work is therein enumerated—read it off.

Mr. Wall—Defendant objects to the reading as incompetent.

<i>A.</i> Painting the walls brick, three coats, . . .	\$720 00	20
All woodwork, doors and windows,	350 00	
Painting 22 class-rooms,	840 00	
Painting hallways and stairs,	140 00	
Twenty-six rooms where the Sisters are,	260 00	
Chapel, painting,	60 00	
Washing off varnish and re-varnishing benches,	570 00	
Shades and window blinds, painting,	106 00	
<hr/>		
Total,	\$3,046 00	30

Bill of April, 1907, offered in evidence by complainant.

Mr. Wall—Objected to by defendant as incompetent and not the best evidence.

Marked Plaintiff's Ex. 25.

Complainant also offers in evidence bill of February 12, 1907, \$219.00.

Objected to by defendant as incompetent and not the best evidence. 40

Marked Plaintiff's Ex. 26.

Complainant also offers in evidence bill of November

29, 1910, previously marked Plaintiff's Ex. A for identification.

Mr. Wall—Objected to by defendant as incompetent and not the best evidence.

Marked Plff's Ex. 27.

CROSS-EXAMINATION, by Mr. WALL:

Q. Referring to Ex. 25, what is the date of this estimate?

A. July 17th.

10 Q. Is that for interior or exterior work, or for both?

A. That is for all.

Q. Have you secured the contract for this? A. I did not.

Q. Did you get the contract, or hasn't it been announced yet?

A. No, it has not been announced.

Q. What did the priest say to you about coming here to testify?

A. All the priest says, in case who is the lowest figure on the job will get the job.

Mr. Wall—Defendant asks that that be stricken out as not responsive.

20 Q. Did the priest make any arrangements for you or with you to testify here?

A. The last time he told me to come here to testify.

Q. When was that? A. I don't remember just when it was.

Q. Was it before or after the estimate was made? A. After.

Q. Anybody else estimate on the job? A. I don't know.

Q. When did the priest ask you to make the estimate?

A. The 14th I got the letter.

Q. Fourteenth of July, this July? A. Yes.

Q. Did the letter give you instructions as to how to estimate?

30 A. Just give me notice to come and see him.

Q. How did you know how much work was to be done?

A. I am a painter and decorator, I ought to know.

Q. The priest didn't tell you how much work to do? A. No.

Q. Didn't the priest tell you what he wanted?

A. He told me what is to be done and give him the price.

Q. Then the priest did tell you what to do, what was to be done? A. He told me what to do.

Q. What did he tell you to do? A. He told me to clean all the school-rooms, class-rooms, windows, doors.

40 Q. He didn't tell you to paint them, just clean them?

A. Yes, painting, too.

Q. Is that all he said? A. Didn't say anything else.

Q. He just told you to clean and paint the class room?

A. Yes.

Q. Now then you say there is \$121.00 out of one of those bills that you didn't get paid? *A.* Yes, \$123.00.

Q. You have never been paid that? *A.* No, it wasn't paid.

Q. Have you got any agreement with the priest as to paying that money?

A. I have got a little more balance than that coming to me.

Q. I didn't ask you that; have you got any agreement with the priest as to paying that money?

A. I think he will pay me some day.

10

Q. That matter has been standing since 1907, has it? *A.* No.

Q. Is that out of the 1910 bill? *A.* Yes.

Q. Did you do that on an estimate, the \$123? *A.* No.

Q. Why didn't you get the money, why didn't you go after the priest and get the money?

A. I always send my bills, I am sure I will get it in a couple of weeks.

Q. And when you didn't get it in a couple of weeks you send again after it? *A.* Yes.

Q. Been sending it to him every month since 1910? *A.* Yes. 20

Q. Did he say he would pay you the \$123 if you would testify here? *A.* He would pay me the \$123, he said.

Q. If you would testify here?

Mr. Wall—Counsel for defendant calls attention on the record that at this point the priest spoke to the witness.

Mr. Hardenbrook—Counsel for complainant wishes to have stated on the record that the priest did not speak to the witness; he laughed, and made no remark to the witness.

80

Mr. Wall—I insist that the priest spoke a word in Polish within hearing of the witness, from whom he was sitting not more than seven feet.

Mr. Hardenbrook—I now ask the interpreter to state whether or not the priest did speak any word in Polish to the witness.

Mr. Wall—I object to taking the interpreter's answer.

Interpreter—I did not hear it.

(Interpreter sitting immediately alongside the witness.) 40

Mr. Wall—Counsel for defendant asks that the priest be excluded from the room during the remainder

of the testimony of this witness. This request is acquiesced in.

Q. Referring to this bill of November 29, 1910, you say that canvas was put up to take care of the cracks in the plaster, is that right? A. Yes, covering all the cracks.

Q. Was that the purpose of putting the canvas there?

A. It would look better by putting it over the cracks.

Q. The cost of putting the canvas there in this bill of \$461.00 was very small, wasn't it? A. Reasonable.

10 Q. How much was it, in money? A. It costs 65 cents a yard.

Q. How many yards were there? A. I can't tell.

Q. Can't you come anywhere near it?

A. There was about 400 yards.

Q. Did you fill up the cracks of the canvas? A. Yes.

Q. That doesn't cost anything to amount to anything, does it?

A. Yes, it costs a little work.

Q. About how much? A. About ten or twelve dollars.

Q. What was there before, at the places where you canvassed?

A. What years, 1907, or 1910?

20 Q. Before you put the canvas there in 1907?

A. Kalsomine; it was decorated.

Q. Which costs the more, kalsomining or painting of the canvas? A. Costs a little more.

Q. Double? A. Pretty near.

Q. Why don't you collect that \$123 from the priest?

A. That is a bill for paper and the place where I bought this paper is in bankruptcy so I couldn't pay that money right there.

Q. You mean that you never got the paper?

A. Yes, I got the paper.

30 Q. The priest got the paper, too, didn't he? A. Yes.

Q. What difference does it make that the man that sold it went bankrupt?

A. We don't know who we would pay that \$123.00 to.

Q. The priest got the paper and you put the paper up?

A. Yes, sir.

Q. And the priest owes you \$123.00 for that paper?

A. For that paper.

Q. You say you didn't know whom to pay for that paper?

A. I don't know.

40 Q. And you never have paid for the paper? A. No.

Q. Just what did you say to the priest about this \$123.00?

A. I told him to give it to me so I pay for the paper.

Q. Is it \$123.00 for the paper alone or for putting the paper up? *A.* Only just for the paper.

Q. What did the priest say—that he wouldn't give it to you or that he would give it to you?

A. He told me if I wanted to pay it there why he will pay me for it.

Q. Pay it where?

A. Sixth avenue and 14th street; Knickerbocker Paper Company.

Q. They are the people to pay, are they?

10

A. Yes, they are bankrupt now.

Q. Have they had a receiver and trustee in bankruptcy appointed? *A.* Yes. And he wrote the priest already.

Q. Hasn't the trustee or receiver in bankruptcy asked you to pay the money?

A. They asked me, and I told them to go and see the priest about it.

Q. Then you do know whom to pay?

A. The priest has got the bill, let him pay it.

Q. You do know who is to be paid for that paper?

20

A. I don't know who.

Q. Do you mean to say, Mr. Zaorski, that when you bought from this Knickerbocker Paper Company in Sixth avenue, and they went into bankruptcy and had a receiver and trustee in bankruptcy appointed, and you get a demand from the receiver or trustee, or both of them, that you should pay the money, that you don't know who to pay?

A. I gave all the writings and the paper to the priest.

Q. I didn't ask you that—do you know who to pay; you do know, don't you? *A.* No, I don't know.

30

Q. Don't you know you are to pay the trustee?

A. No, I don't know who is the trustee.

Q. Your idea is that when a concern goes into bankruptcy you don't have to pay them anything you owe them? *A.* Why not?

Q. Then that is not your idea? *A.* I got to pay him.

Q. How many times did the trustee ask you to pay?

A. Only once.

Q. How long ago? *A.* About four months ago.

Q. What was the name of the concern?

A. Knickerbocker Wall Paper Company.

40

Q. Now the money was owing from before November 29, 1910, wasn't it? *A.* Yes.

Q. Do your books show when you bought the paper from the Knickerbocker Wall Paper Company? A. No.

Q. Why didn't you pay the Knickerbocker Wall Paper Company between November 29, 1910, and four months ago, when you were first asked for the money?

A. Because the written paper, the bill, was not put in my name, but in the priest's.

Q. Then you never owed the money to the Knickerbocker Wall Paper Company?

10 A. We were together—the priest and I—and they sent me a bill and sent the priest a bill for the same amount.

Q. And your idea is that the priest owes the money and you don't; is that right? A. Yes.

Q. When did you send the priest the bill for the \$123.00?

A. He has not got that bill of \$123.00.

Q. Then you never charged the priest for the \$123.00?

A. No.

Q. I understood you to say that \$123.00 of the bill was not paid—that is what you said on your direct examination?

A. I don't know if he paid it or not.

20 Q. Didn't you ever ask the priest to pay you the \$123.00?

A. I gave him no bill; I went to him.

Q. Didn't you ever ask the priest to pay that \$123.00?

A. I asked him to pay over there.

Q. You never asked him to pay it to you? A. No.

Q. Then the \$123.00 has nothing to do with the \$461.00?

A. No.

Q. The priest ordered the \$123.00 worth of paper? A. Yes.

Q. And yet the company and the trustee sent the bill to you?

A. Before they were bankrupted.

30 Q. Did you tell them to charge the priest when the paper was bought? A. Yes.

Q. You bought the paper, didn't you? A. Together.

Q. You and the priest were together?

A. He was picking it out; what he liked.

Q. Isn't that the way you always do with your customers; they pick out the paper, and the bill is sent to you?

A. According to the way we fix it up.

40 Q. Isn't your regular practice with your customers to take them to the place where the wall paper is, and let them pick out the wall paper and then the company sends the bill to you?

Mr. Hardenbrook—Objected to by complainant as irrelevant, incompetent and immaterial.

A. Not every time.

Q. But this was one of those times when you did do that?

A. This was on his.

Q. What do you mean? *A.* It was on his name.

Q. On the priest's name? *A.* Yes.

Q. And you told the wall paper company to charge the priest and not to charge you? *A.* Yes.

Q. You did that at that time? *A.* Yes.

Q. What did you mean in your direct examination when you said there was \$123.00 which the priest did not pay you? 10

A. I wanted him to pay me and then I would take the money and pay the company.

Q. You kept that book yourself that you have been testifying from? *A.* Yes.

Q. All those entries in your handwriting? *A.* Yes, sir.

Q. What period does this book from which you are testifying cover; from what dates?

A. From the 1st of January, 1909, up to date.

Q. I notice on page 17 of this book an account in the Polish language, appears to be crossed out, and the words, "Wall paper, 20 \$123.00," are written down below.

A. I put that down to-day.

Q. That is the \$123.00 you speak of? *A.* Yes.

Q. For wall paper? *A.* Yes.

Q. And this is in the account which you have with Father Kwiatkoski? *A.* It is not in the account.

Q. What isn't in the account? *A.* That \$123.00.

Q. You have written it on this page?

A. Yes, with a lead pencil.

Q. And you have crossed out something else there?

A. That does not belong to the church.

Q. When did you cross that out?

A. Who pays me I cross that out; that does not belong to this.

Q. Is the account of work which you have done on the school and church and rectory and sisters' house for the church of St. Anthony of Padua, found on pages 16 and 17 of this book, that is, work which you have done? *A.* Yes.

Q. Do pages 16 and 17 show the account with this priest and this church of St. Anthony of Padua for the work you have done and the amounts since January 1st, 1909, to date? *A.* Yes.

Q. You have made some other pencil entries on page 17 of the 40 account; when did you make those entries? *A.* To-day.

Q. Before you came to this hearing? *A.* I did it here.

Q. When? A. When I was sitting down.

Q. With the priest?

A. No; separate school and separate rectory.

Q. I call your attention to page 17—on which side of the account is what is owing to you, and which side of the account is what you owe?

A. I put the money on the other side, and here I put down what work I do (signifying).

Q. So, then, the left side of the page 17 is what you are to
10 be paid for and the right-hand side is what the other person should be credited with; that is right? A. Yes, sir.

Q. So the left hand side of page 17 is the debit side, and the right-hand side shows what you are paid for your work?

A. Yes, sir.

Q. Why did you write in pencil the words, the figures rather, "\$123.00," on the left hand side of page 17?

A. Because it is the account.

Q. Because it is due you? A. Yes.

Q. You ought to be paid that \$123.00?

20 A. I only just marked it down, how much it was.

Q. When did the priest tell you he would let you know whether you were going to be allowed to do the work on your estimate of July 17, 1911? A. I received the letter on the 14th.

Q. Don't you get paid for coming over her to testify? A. No.

Q. You work at your own trade, don't you; you work with your men? A. Yes.

Q. And every day you come to court, that is so much money out of your pocket, isn't it?

A. I am only coming here; I want to get that other job.

30 Q. What does that have to do with it; why do you think you will get that other job if you come here?

A. If I got the figure I think I ought to get the job.

Q. How does it help you to come here and testify, and waste your time here? A. It don't pay me to come here.

Q. The priest never said if you would come here he would give you the job? A. I will have to look after it.

Q. He never said anything to you about getting the job, did he?

A. Well, he told me whoever have the lowest figure will get it.

40 Q. So you are just coming here to testify in the hope that that will influence the priest to give you the job?

A. I came looking for the priest; I didn't know anything about the case.

Q. You testified here before, didn't you?

A. That was the first time; I found out when I was here.

Q. Didn't you have any arrangement to get paid today for coming over here today? *A.* No.

Q. How do you get any advantage by coming here today; if you have the lowest figure you will get the job, won't you?

A. Yes, sir.

Q. So you are fooling away your time coming here?

A. Can't help it.

Q. You are no friend of the priest, are you?

A. Know him for a long time.

10

RE-DIRECT, by Mr. HARDENBROOK:

Q. How long have you been doing work on this church?

A. Eighteen years; about seventeen years.

Q. And how long ago was it that you gave these papers that you received in the bankruptcy matter of the Knickerbocker Wall Paper Company to the priest? *A.* When we finished up the job.

Q. You testified about getting some bankruptcy papers and giving them to the priest—how long ago was that?

A. About six months.

Q. About six months ago? *A.* Yes, sir.

Q. You testified on cross-examination that there was some 400 yards of canvas used? *A.* Yes.

Q. Was all that canvas used in recovering the cracks in the plaster? *A.* The whole ceiling; covered the whole ceiling.

Q. This 400 yards was used then in covering the whole ceiling of these different rooms? *A.* Yes.

Q. And not particularly the cracks?

Mr. Wall—Objected to by defendant as leading. 30

A. Yes, the whole ceiling.

Q. Was the whole ceiling cracked?

A. Not all over; just places cracked.

Q. I call your attention to page 17 in this book of your accounts which the counsel has asked you some questions about, and call your attention to the lead pencil marks appearing on the right hand side; who wrote those lead pencil marks?

A. I marked it separate, between the rectory and school in pencil.

Q. These figures then in lead pencil on the right hand side of page 17 separate into the items belonging to the school and church the items which appear on the left hand side? 40

A. Yes, I only put them in lead pencil separate and the right figures is on the other side.

Q. I notice on the left hand side of this page there is an item there, "St. Paul's Ave.", is that at all connected with St. Anthony's church? A. No, that is separate work.

Complainant offers in evidence page 17 of the witness' book of accounts regarding which he has been interrogated.

Marked Plff's Ex. 28.

RE-CROSS EXAMINATION.

10 Q. All these pencil items where you attempted to separate on page 17, and show what was for the church and what was for the rectory, are on the right hand side of page 17? A. Yes.

Q. Now this St. Paul's Avenue charge, you say that had nothing to do with the church? A. No.

Q. That was for some private building of the rector's?

A. That was for a brother of the priest, a contractor.

Q. Did that have anything to do with White Eagle Hall?

A. No.

Q. You don't know where White Eagle Hall is?

20 Q. There is another bill there, of work there.

Q. Was this work for the brother of the priest charged to the church? A. No.

Q. Has it been paid? A. Yes, it is paid.

Q. Who paid it? A. Edward Sontag.

Q. You say the priest didn't pay that?

A. It didn't belong to the priest.

Q. Did the priest pay it? A. No, Sontag paid it.

Q. Why did you charge it in the account with the church?

30 A. I put it there in case if the brother would not pay it that the priest would.

Q. Who is this account with on page 16—page 17 is with the priest? A. With the congregation.

Q. Who told you to put it in this account, this St. Paul's Avenue charge? A. That is my private book.

Q. The priest didn't tell you to do that? A. No.

Q. Who told you to cross it out this way?

A. I done that myself.

Q. This morning? A. Before.

Q. Didn't you cross that out this morning? A. No.

40 Q. Did you show this book to the priest this morning?

A. No.

Further hearing in this matter adjourned to September 6, 1911, at 10:30 A. M.

United States Circuit Court, District of New Jersey,

ROMAN CATHOLIC CHURCH OF ST.

ANTHONY OF PADUA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant.

} Testimony.

10

Testimony taken in the above entitled matter before Hon. George R. Beach, Examiner, duly appointed by order of Judge Joseph Cross, at hearing at his office, 75 Montgomery street, Jersey City, New Jersey, on the 6th day of September, nineteen hundred and eleven, at 10:30 A. M.

Appearances—Mr. FRANK M. HARDENBROOK, of counsel for the complainant; Mr. ALBERT C. WALL, of counsel for defendant.

MICHAEL J. DOYLE, being called as a witness by complaint, and being duly sworn according to law, on oath testified 20 as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. What is your business?

A. Police officer, City Police Department.

Q. Connected with the police department of Jersey City?

A. Yes, sir.

Q. How many years have you thus been connected with the police department? A. Twelve years.

Q. The past twelve years? A. Yes, sir.

Q. And you are still connected with the police department? 30 A. Yes, sir.

Q. Were you requested last summer to make an investigation as to the emission of smoke by the Pennsylvania Railroad on or about Sixth street in Jersey City? A. Yes, sir.

Q. By whom were you requested to do that?

A. I was detailed from the police department and health department under Health Inspector Hague, Officer Morris Murphy and myself.

Q. And did you and Officer Morris Murphy make certain investigations as to the emission of smoke at the point designated? 40 A. Yes, sir.

Q. What was the point?

A. At different places we took notes, different engines.

Q. When was the first investigation which you made?

A. July 20, 1910.

Q. And where was that investigation made?

A. It was taken between Monmouth and Brunswick streets on Sixth street.

Q. Jersey City? *A.* Yes, sir.

Q. What was the result of your investigation on that date?

A. We took the numbers of several engines that were emit-

10 ting black smoke.

Q. What time was it?

A. Different times here. (Witness produces memoranda.)

One at 2 P. M.; engine No. 2787; wind from the south; train, freight, several cars; this was going westerly.

Q. Did you find any other engines that same day?

A. Yes, we got two engines; 966, this was about the same time; engine 966 from the same point; freight, several cars, westerly; same place between Monmouth and Brunswick on Sixth street. Then there is another engine about the same time; en-

20 gine 158, same direction, freight.

Q. Were those engines emitting smoke?

A. Yes, all black smoke; we didn't take any engines except those emitting black smoke.

Q. When was the next investigation?

A. The 21st; this was in the morning, 10:05; we got two engines coupled together, Nos. 2508 and 2785; the wind that day was from the south; this was a coal train.

Q. What were those engines doing?

A. Coal train; several cars; drilling, between Grove and Erie;

30 11:30 A. M., same date, 2650 and 1344, two engines coupled together; freight, going westerly direction between Grove and Coles street.

Q. What were they emitting? *A.* All black smoke.

Q. The next date, please?

A. July 22d, 10:30 A. M., engine 2511, wind from south; drilling, several cars between Grove and Henderson, all on Sixth street; 10:33 A. M., engine 966, wind same direction; drilling, several cars at Grove street; 11:15, engine 2504, several cars drilling between Grove and Erie street; 11:16 A. M., engine 2050, engine and caboose going east between Grove and Erie.

40

Q. All those on July 22d? *A.* Yes.

Q. What was the next date?

A. July 25th, 1:55 P. M., engine 665, wind from west, coal

train, several cars, drilling, at Erie street; 2:08 P. M., engine 966, wind west, freight, several cars drilling at Grove street. Time, 2:22 P. M., engine 2787, freight, several cars, drilling, Henderson street. Time, 4:05 P. M., engine 766, drilling, several cars at Grove street.

Q. Those engines all emitting black smoke?

A. Didn't take anything but black smoke. Now we have the 26th: Time, 9:56 A. M., engine 2511, wind from the west, freight, drilling between Grove and Erie.

Q. When you say drilling, you mean by that what?

A. Moving up and down, back and forth.

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Q. Go on.

A. Time 10:53, engine 966, freight, several cars, drilling at Grove street; 11:14 A. M., engine 708, freight, several cars drilling at Grove street. Time, 11:41 A. M., engine 665, freight, several cars, drilling, at Erie street. Time, 11:52 A. M., engine 5231, freight, several cars; this was going westerly direction, at Brunswick street. Time, 3:49 P. M., next one; two engines coupled together, 2788 and 2650, coal train, several cars, westerly direction, between Grove and Henderson streets. Time, 4:10 P. M., two engines coupled together, 582 and 708, freight, several cars, west, between Grove and Henderson streets. Time, 4:27 P. M., engine 2508, coal, several cars, drilling, at Grove street.

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Q. They were all emitting black smoke?

A. All emitting black smoke.

Q. Go on, when is the next date?

A. July 27th: Time, 11:28 A. M., engine 2787, wind southwest, train freight, several cars, drilling at Grove street; 11:30 A. M., engine 2820, engine and caboose, switching at Grove street, and going up and down, drilling; 11:36 A. M., engine 2788, freight, several cars, drilling, at Grove street; 11:45 A. M., engine 1402, light engine, no cars, wind east, at Monmouth street; 2:05 P. M., engine 1082, freight, several cars, drilling, at Grove street; 2:25 P. M., engine 2785, stock cars, cattle cars. That was all for the 27th.

30

Q. All these emitting black smoke? *A.* Yes, sir.

Q. Go on; what is the next date?

A. July 28th: Time, 9:43 A. M., engine 366, wind from the north, engine and one car drilling, between Grove and Henderson; 9:50 A. M., engine 664, freight, several cars, east at Grove street; 10:54, engine 2511, coal, several cars, drilling at Grove street; 10:58, engine 2508, coal, several cars, drilling, between

40

Grove and Erie; 11:08 A. M., two engines coupled together, 1402 and 2511, stock cars, several, west, at Grove street. 3:55 P. M., two engines coupled together, 2508 and 708, coal, several cars, east, at Grove street.

Q. All emitting black smoke? *A.* Yes, sir.

Q. Go on—what is the next date? *A.* July 29th.

Time, 9:50 A. M., engine 2856, wind from west, freight, several cars, west at Henderson street.

1:50 P. M., engine 2785, five cabooses, no cars, drilling at 10 Brunswick street.

3:03 P. M., engine 582, freight, several, drilling at Grove.

3:09 P. M., engine 708, light engine, no cars, going west, at Grove street.

3:12 P. M., engine 2788, freight, two cars, drilling at Grove street.

4:08 P. M., engine 966, engine and pusher, one car, west at Henderson street.

Q. All emitting black smoke? *A.* Yes, sir.

Q. Go right along, the next date? *A.* July 30th.

20 Time, 8:37 A. M., engine 2785, wind from the south, freight, several cars, drilling at Brunswick street.

9:45 A. M., engine 2788, engine and pusher, going east, at Henderson street.

9:46 A. M., engine 708, engine and pusher, west at Henderson street.

9:49 A. M., engine 966, freight, several cars, drilling, between Grove and Henderson.

10:14 A. M., engine 2511, coal, two cars, east, Henderson.

10:30 A. M., engine 2830, freight, west, freight one car, 30 at Grove street.

11:07 A. M., two engines coupled together, 2511 and 99, freight, several cars, west between Grove and Erie.

Q. Those all emitting black smoke? *A.* Yes, sir.

Q. Go right along? *A.* August 1st, the next date:

Time, 9:42 A. M., engine 191, engine and pusher, wind from the south that day, east at Henderson street.

2:16 P. M., engine 708, freight, several cars, west at Grove street.

1:47 P. M., engine 2785, freight, several cars, east, Brunswick street.

2:02 P. M., two engines coupled together, 2504 and 2788, freight, east between Coles and Monmouth.

- 2.55 P. M., engine 2650, no cars, west, Grove street.
All emitting black smoke.
- The next date, August 2d, wind from the south:
- Time, 9.42 A. M., engine 2511, no cars, east at Grove street.
10.58 A. M., engine 1344, coal, several cars, drilling at Henderson street.
- 11.03 A. M., engine 708, freight, several cars, drilling at Henderson street.
- 11.37 A. M., two engines coupled, 2788 and 969, freight, several cars, west, between Grove and Henderson. 10
- 11.45 A. M., engine 2509, freight, several cars, west at Henderson street.
- 12.05 P. M., engine 830, coal, several cars, west at Cole street.
- 4.45 P. M., engine 1030, freight, three cars, west at Grove street.
- 4.50 P. M., two engines coupled, 2787 and 1344, coal, several cars, going east at Erie street.
- All emitting black smoke.
- The next date, August 3d, wind from the south: 20
- 1.50 P. M., engine 2508, freight, several cars, drilling at Brunswick street.
- 2.04 P. M., engine 2787, freight, several cars, west at Grove street.
- 2.14 P. M., two engines coupled, 708 and 582, freight, several cars, west at Grove street.
- 2.32 P. M., engine 2511, flat car, three cars, drilling at Grove street.
- 2.45 P. M., two engines coupled, 2511 and 158, coal, several cars, west at Grove street. 30
- 2.55 P. M., engine 1344, coal, several cars, drilling at Grove street.
- 3.49 P. M., engine 966, freight, several cars, west at Grove street.
- All emitting black smoke.
- The next date, August 4th, wind from the south that day:
- Time, 10.06 A. M., engine 958, light engine, no cars, west at Henderson street.
- 11.20 A. M., engine 2788, freight, several, drilling at Henderson street. 40
- 11.27 A. M., engine 2508, coal, several, drilling at Grove.
- 11.37 A. M., engine 2511, freight, several cars, drilling at Grove street.

3.54 P. M., engine 969, freight, several cars, west at Grove street.

4.09 P. M., 582, light engine, no cars, west at Grove street.
All emitting black smoke.

The next date, August 5th, wind from the west that day:

Time, 2.41 P. M., engine 708, freight, several cars, drilling at Grove street.

2.56 P. M., engine 2797, freight, several cars, drilling between Grove and Henderson streets.

10 3.24 P. M., engine 2511, freight, several cars, drilling at Grove street.

3.30 P. M., engine 969, freight, several cars, west at Grove street.

3.40 P. M., engine 966, freight, several cars, drilling at Grove street.

4.32 P. M., engine 2940, coal, several cars, west at Grove street.

4.43 P. M., engine 191, freight, several cars, West at Grove street. All emitting black smoke.

20 The next date, August 8th, wind from the south that day:
Time, 9.47 A. M., passenger, several cars westbound between Cole and Monmouth streets, Engine 1063.

9.53 A. M., engine 526, passenger, five cars, westbound at Monmouth street.

10.00 A. M., engine 5027, light engine, no cars, eastbound at Monmouth street.

10.08 A. M., engine 1046, two engines, no cars, westbound at Monmouth st. One engine not smoking.

10.10 A. M. engine 642, passenger, five cars, westbound between Monmouth and Brunswick streets.

30 10.23 A. M. engine 1984, passenger, seven cars. Westbound at Monmouth St.

10.28 A. M., engine 3150, passenger five cars, westbound at Monmouth St.

10.35 A. M., engine 2765, light engine, no cars, Eastbound at Monmouth St.

11.11 A. M., engine 2992, passenger, 6 cars, westbound at Brunswick Street.

11.25 A. M., engine 1439, passenger, several cars, westbound at Marseles Street.

40 All emitting black smoke.

The next date, August 9th, wind from the East that day:

Time, 10.21 A. M., engine 1984, passenger, 7 cars, westbound at Jersey Avenue.

10.23 A. M., engine 2014, passenger, 6 cars, westbound at Jersey Avenue.

10.25 A. M. engine 6011, passenger, five cars, westbound at Jersey Avenue.

10.27 A. M., engine 5093, passenger, six cars, westbound at Jersey Avenue.

10.40 A. M., engine 2992, light engine, no cars, eastbound at Barrow Street.

11.00 A. M., engine 1435, passenger, 3 cars, westbound at Brunswick Street.

10

All emitting black smoke.

Q. I notice from the testimony which you have given that the time on each day when you made these various examinations is all about the same time, or within an hour or so of each other, how long did you remain on this work each day?

A. We had to go around and get witnesses, too.

Q. How long did you remain on the work? *A.* We had no specified time.

Q. You were not there all day each day? *A.* No, not all day.

Q. For instance, on August 3d, you make seven investigations, all included within two hours time? *A.* Yes.

Q. Is that practically all the time that you devoted there that day to this investigation? *A.* Yes.

Q. And that is true of each of the other days? *A.* Yes.

Q. Did you visit the priest's house, the house of Father Kwiatkowski, the father officiating in St. Anthony's Church?

A. Yes, sir.

Q. When did you visit his house? *A.* July 19th.

Q. On the day previous to making your first memoranda? *A.* Yes, sir.

30

Q. And what conditions did you find existing in his house?

A. I went along with Officer Maurice Murphy and Health Inspector Hague along.

Q. What did you find in the priest's house. *A.* Sweeping up different particles of stuff on the floor; soot.

Q. Were those particles of soot which you swept up on the floor the kind and character which you are familiar with as coming from the engines of the Pennsylvania Railroad Company? *A.* Yes, sir.

Q. That block between Monmouth and Brunswick on Sixth Street, is used, so far as your observation showed you, for what purpose, that block between Monmouth and Brunswick Streets, by the railroad company?

40

A. I don't know—they seem to do quite a lot of drilling up there, and backing up and down, and then they stop there quite often.

Q. Standing trains? A. Some of them.

Q. Freight trains? A. Freight.

Q. And during your investigations on these various dates, was that the condition which you found existing on practically all those dates?

10 Mr. Wall—Objected to by defendant as irrelevant and absolutely immaterial.

Q. Was that practically the same condition which you found on all those dates? A. Yes, sir, about the same, different trains.

Q. About how many standing freight cars would you see standing on the tracks?

Mr. Wall—Objected to as irrelevant.

A. Several, but them seem to be mostly freight cars, all the time; sometimes we couldn't get the number of the engine.

CROSS-EXAMINATION, By Mr. WALL:

20 Q. You are actively engaged with helping the city with its case against the railroads, are you not? A. Yes, sir.

Q. And you were looking up witnesses and getting evidence of all kinds to help the city's side of the case?

A. To get witnesses, and taking notes.

Q. What was wrong in what I asked you, what couldn't you answer yes to? A. You said, helping the city in different things; I was only at certain things.

Q. Were always only the same thing or different things?

30 A. I was only just to get the engines that were giving smoke, and getting witnesses.

Q. And when you went around and saw people you explained to them the cause of your coming there? A. Yes, sir.

Q. You had never had occasion to make observations of the color of smoke before this time? A. No, not before this time.

Q. And when you say black smoke, what do you mean by black smoke? A. Real black smoke, heavy smoke coming out of an engine.

Q. Jet black? A. Jet black.

Q. And you only counted smoke that you called jet black?

40 A. That is all, in our observations, notes.

Q. Never gave the city the benefit of the doubt in the slightest way when you saw smoke that had a yellowish tinge?

A. We didn't take note of that.

Q. Only took the dense black smoke? *A.* Black smoke.

Q. How long would it hang over the engine, this smoke when it came out? *A.* Quite some time in some cases.

Q. Ever made any observation as to that? *A.* No, not to count the time.

Q. Ever make any observations of any engines that burned any other coal than the same coal these engines were burning?

A. No, sir.

Q. You had never made observations of this kind anywhere, had you? *A.* No, sir.

10

Q. Did you have with you any standards to compare the smoke, did you have any papers, or had you ever heard of such a thing? *A.* Nothing to compare with only our eyes there.

Q. Did you ever hear of any method of standardizing the color of smoke? *A.* No, sir.

Q. For just such observations? *A.* No, sir.

Q. You didn't know that they classed the smoke that went from black down to gray in different ways in some places in this country? *A.* No, sir.

Q. Never heard of that? *A.* No, sir.

20

Q. Well now, didn't you rather work this on the theory that black is black, and that anything you saw coming out of there with a dull, blackish, bluish, brownish or yellowish color was black? *A.* No, sir.

Q. Now, you are a serious man and accustomed to looking things over, and you sit here and say that that smoke was black as jet? *A.* Yes, sir.

Q. What is jet? *A.* Very black.

Q. What is jet? *A.* As black as you can make it.

Q. What is the thing called jet, do you know, is it a chemical 30 or is it a vegetable? *A.* It is not either.

Q. What is jet? *A.* It is what you call black.

Q. You don't know what the thing called jet is?

A. I could not explain it to you.

Q. But it is as black as this thing you don't know about?

A. I know a black object; I know it is black.

Q. What I am trying to get at is, there are all kinds of black, bluish black, brownish black, and greenish black?

A. I am not up in colors; I know there is different shades of blackness.

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Q. You know what lamp black is? *A.* Yes, sir.

Q. Do you mean to say that this smoke was as black as lamp black? *A.* Yes, sir.

Q. You will swear to that, will you? *A.* Yes, sir.

Q. And how wide would the smoke be, this lamp black colored thing so black you couldn't see anything through it—could you?

A. No, not right at the smoke stack and for some distance; of course, when it separated around you could see.

Q. How far from the smoke stack would it exist in this dense, lamp black condition? *A.* I couldn't tell you the distance.

Q. Did it fill you with surprise? *A.* No, it wouldn't surprise me.

10 *Q.* You had never seen such a thing all your life long?

A. I certainly did.

Q. How long have you been around that part of the city?

A. All my life.

Q. How old are you? *A.* Thirty-three.

Q. You didn't see anything that first day you went out that you had not seen all the rest of the years? *A.* No, sir.

Q. Same old thing, eh? *A.* Yes, sir.

Q. Are you familiar with that locality? *A.* Yes, sir.

20 *Q.* And have been all your life? *A.* Yes, since I can remember.

Q. Did you make the observations all yourself and make the notes yourself? *A.* All with Mr. Murphy.

Q. What part of it did you do? *A.* We went together and we compared notes, just the same.

Q. How would you do; describe to me what you did?

A. We went out together, we were always together when we took the notes, an engine would come along with the black smoke and we would take the number and put it on the books; he has a book and I have a book.

30 *Q.* Would he call off the number and you write it down?

A. No, we both look at the number and then put it down.

Q. Did you ever have any question at all as to what numbers ought to go down? *A.* No.

Q. What were your instructions when you went out there, as to the color of the smoke? *A.* To take only black smoke.

Q. Were you given any instructions as to what was black smoke? *A.* No.

RE-DIRECT, by MR. HARDENBROOK:

40 *Q.* During the time that you were making these investigations you saw, did you not, various other engines emitting smoke of a lighter degree in color than those you took memoranda of?

Mr. Wall—Objected to by defendant as leading and improper.

A. Yes, sir.

Q. And the only engines which you took the numbers of were such engines as were emitting black smoke? *A.* Yes, sir.

Q. All others you did not take? *A.* No, sir.

Q. Did you observe the tenders connected with any of these engines, which you took the memorandas of? *A.* No, we didn't observe the tenders.

Q. The tender is the thing back where the coal is?

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A. Yes, I know.

MAURICE MURPHY, called as a witness by complainant, being duly sworn, on oath testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. What is your business? *A.* Police officer.

Q. Connected with the police department of Jersey City?

A. Yes, sir.

Q. And have been for how many years? *A.* About two years and a half.

20

Q. Were you requested by any one during the previous summer to make any investigations on Sixth Street as to the emission of smoke by the engines of the Pennsylvania Railroad Company? *A.* Yes, sir.

Q. In the neighborhood of Brunswick and Monmouth Street? *A.* All on Sixth Street.

Q. By whom were you requested to make this investigation? *A.* We were detailed to the Board of Health.

Q. And who in connection with the Board of Health gave you instructions what to do? *A.* I suppose it came from the Chief.

30

Q. Who, in the Board of Health, told you what to do?

A. Inspector Hague.

Q. He is Inspector of the Board of Health of Jersey City?

A. Yes, sir.

Q. And you started in with that investigation on the 20th, 1910, did you not? *Q.* Yes, sir.

Q. And continued your investigation at various dates up to the 9th of August, 1910, did you not? *A.* Yes, sir.

Q. At the time you made these various investigations, did you personally take the memoranda in a book? *A.* Yes, sir.

40

Q. Of the conditions which you found existing? *A.* Yes, sir.

Q. You have that memorandum book with you? *A.* Yes, sir.

Q. And that is a correct statement of the conditions as they

existed, showing the number of the engines, the direction of the wind, the kind of cars, and what the car was doing at that time? *A.* Yes, sir.

Q. On July 20, at 4.02 P. M., you made investigation and found engine number 2787? *A.* Yes, sir.

Q. Emitting black smoke? *A.* Yes, sir.

Q. The wind from the south, freight train, several cars, bound westerly direction? *A.* Yes, sir.

Q. Were you with Officer Michael J. Doyle at the time you made these investigations? *A.* Yes, sir.

10 *Q.* And have you heard the testimony as given by Michael J. Doyle? *A.* Yes, sir.

Q. And is that testimony correct as to the observations which you made at that time? *A.* Yes, sir.

Q. At the time you made these investigations, officer, did you see other engines moving up and down which were not emitting black smoke? *A.* Yes, there were other engines.

Q. And the only memoranda which you took note of were of such engines as were emitting black smoke? *A.* Yes, sir.

20 *Q.* Did you visit Father Kwiatkowski's house in connection with Officer Doyle on the 19th of July, 1910? *A.* Yes, sir.

Q. And what did you find there? *A.* We went in the house, and one of the floors was swept up, got a lot of soot like.

Q. Is that the kind of soot which you are familiar with as coming from the engines of the Pennsylvania Railroad? *A.* Looked like it.

CROSS-EXAMINATION, by Mr. WALL:

Q. Where did you make these sweepings? *A.* In one of the rooms we happened to be in.

30 *Q.* What room was it in? *A.* It was like a sitting room; I couldn't tell you the room.

Q. Did you go upstairs at all? *A.* No, sir.

Q. Stayed on the first floor? *A.* Yes, sir.

Q. And was it right off the floor or under the furniture?

A. Right off the floor, right around the floor.

Q. Around the base board? *A.* Around the base board and the floor generally.

Q. You didn't make any examination of the stuff?

A. No, he just swept it up and showed it to us in the paper.

40 *Q.* He swept it up while you were there? *A.* He was just showing us how it came in; got a brush and swept it up.

Q. You never made any examination of the soot; you don't

know the character of the soot, except generally that it is soot from coal dust, that is all you know about it?

A. That is all.

Q. You never had any experience in taking observations of smoke before? *A.* No, sir.

Q. This is the first time you ever did it? *A.* First time.

Q. And nobody ever gave you any special instructions except to see that they were emitting black smoke? *A.* Yes, sir, that's right.

Q. In any way? *A.* We were to take the number of the 10 engines that emitted black smoke.

Q. And any smoke coming out in any volume you would put it down? *A.* Yes, sir.

PROFESSOR FREDERICK L. PRYOR, called as a witness by complainant, being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. Where do you reside, Professor? *A.* Newark, N. J.

Q. What is your business? *A.* Chemical Engineer, and employed as Professor of Experimental Engineering in the Stevens Institute of Technology at Hoboken. 20

Q. And how long have you been an engineer? *A.* Fourteen years.

Q. Has the experience which you have had in engineering led you in any way to the study of smoke, and the effects of smoke, and the reasons for smoke, from various coals and other substances used for fuel and firing purposes?

A. Yes, sir, in this way. Part of my work is the study of boilers, furnaces, and fuels used in furnaces, and the proper 30 burning of the fuels on the grates which would produce no smoke conditions; that is, that the fuel should be so burned that there will be no smoke coming out of the stacks.

Q. How long an experience have you had in that line?

A. Ever since I have been a graduate from college I have been testing boilers, that is about fourteen years, and I had a year's experience before graduation.

Q. Are you familiar with the properties and general effects of what is commonly called bituminous or soft coal?

A. Yes, sir.

Q. Do the various kinds of soft coal vary in the amount of smoke they would give out? *A.* They do, yes, sir. 40

Q. Will you please explain generally the scientific reasons for the emission of black smoke in the use of soft coal?

A. All coal contains what is known as combustible matter; that is, the portion of the coal that is not left on the grate or in the ash is called combustible matter, the other part being the ash; the combustible matter of coal is divided into what is known as volatile matter and fixed carbon; the percentages of these two items vary in coals from anthracite down to bituminous; what is known as anthracite coal will carry not more than 10 eight per cent. of volatile matter; what is known as semi-anthracite runs from 8 to 20 per cent.; semi-bituminous coal carries from 12½ to 25 per cent. volatile matter; bituminous carries from 25 to 50 per cent. volatile matter, the other percentages making 100 are what is known as fixed carbon. Now these coals will produce smoke in a degree proportional to the amount of volatile matter; that is, the more volatile matter the more liability to produce smoke.

Q. You say liability? *A.* Well, the more probability.

Q. Isn't it an actual fact, stripped of all probabilities, that the 20 greater amount of volatile matter in coal necessarily carries with it the greater amount of black smoke; it is a fact, isn't it, stripped of all probabilities?

A. No, that is not true; the smoke is the non-burning of the coal, and the probabilities are that you cannot burn these high volatile matters.

Q. The black smoke which is emitted in the burning of soft coal is what is known as unconsumed carbon?

A. Unconsumed carbon, yes, sir.

Q. Will what is known as anthracite produce any dense black 30 smoke?

Mr. Wall—Objected to by defendant as irrelevant, and on the further ground that the company has the right by statute and charter to use any fuel it pleases, and its discretion in that regard cannot be subjected to the standards set up by witnesses in evidence.

Mr. Hardenbrook—The company has no statutory right to maintain a nuisance.

Q. Go on, Professor, will what is known as anthracite produce in the burning of it any dense black smoke?

40 A. No, sir.

Q. Does it produce any smoke at all, that is noticeable?

A. No, sir.

Q. Will coke give off any smoke at all?

Mr. Wall—Objected to by defendant on the same ground as stated before in referring to the question regarding the producing of smoke from anthracite coal.

A. It will not, because the volatile matter has all been taken out of the coke.

Q. What is it in the bituminous coal? A. What is commonly known as soot or unburned carbon.

Q. Is there any element in soft coal which will cause the rotting or corroding of sheet iron roofs?

Mr. Wall—Objected to by defendant as irrelevant, 10

there being no claim in this case for damages to sheet iron roofs.

Q. Or what is commonly known as tin roofs?

A. Bituminous coals contain sulphur; in burning the coal some of the sulphur passes off as a sulphurous gas, which, coming in contact with moisture would make sulphuric acid, which will attack iron, or what is commonly known as tin roofs.

Q. You are familiar with the material which is used generally for roofs, which are called tin roofs? A. Yes, sir.

Q. Is that roofing tin at all, or what is that? A. It is a steel 20 plate; iron dipped in tin.

Q. And speaking of a roof as a tin roof is a misnomer?

A. Yes, sir.

Q. Will you explain why or how smoke comes from engines burning soft coal? A. In firing a boiler it is necessary for us to open the firing door in order that the fireman may put the coal on the grate; in doing so a large amount of cold air rushes in and tends to cool the fire; at the same time the coal, having more or less small particles with it, fall into the crevices between the fire and cut off the air supply from below the grate; both the cold air and cutting off the air supply from below the grate, will not allow the volatile matter in the coal to completely burn; the non-burning of this volatile matter, which carries carbon, is what makes smoke or soot. 30

Q. That can be regulated to a greater or less degree by the quality of the coal, the quality of the engine and the care with which it is fired? A. Yes, sir.

Q. You are familiar, are you not, with the operation of locomotive engines and railroads, more or less, you have seen engines operated? A. Yes, sir.

Q. What is the occasion, or what causes the puffing of an engine and the throwing out of dense quantities of smoke at the starting of an engine, when an engine starts up? 40

A. In the starting up of an engine the exhaust steam coming from the cylinder comes out from the stack; the engineer, in order to start his engine will have to open up his throttle wide, which emits a great quantity of exhaust steam; this large quantity of exhaust will make a considerable draft on the fire, and if there is any coal unburned at the particular time it naturally draws up such unburned products from the fire bed.

Q. Is that exhaust steam a continuance performance at the starting of an engine? *A.* That depends principally on whether

- 10 *you were going upgrade, down grade, or on the level; if you were going up grade you would emit considerable exhaust steam in starting; on the level you might be able to reduce it down somewhat, and going down hill you could shut off your steam after starting.*

Q. What is the occasion for intermissions between the puffs of smoke which come from an engine after starting?

A. The alternate exhausting of a cylinder, each end of each cylinder, most engines having two cylinders, would emit a puff, and there would be four puffs to every revolution of the engine,

- 20 *and starting up, of course, the turning speed of the wheels is comparatively slow; that is the reason you notice the puffs more than when they are running faster.*

Q. After the engine succeeds in getting under headway, that puffing is eliminated, is it not, to some considerable extent? *A.* I don't know that I would say it was eliminated; it is because the quantity of steam is shut down, and the engine beginning to move faster will make more of a continuous flow of steam and gases from the stack and it will not be noticeable as before.

- 30 *Q.* And the intermission between the puffs will not be so great? *A.* That is it; same number of puffs to the revolution of the engine, more revolutions per minute.

Q. I show you, Professor, what has been marked in evidence as Plaintiff's Ex. 12, and ask you if you will kindly look at the substance contained in that envelope, and state whether or not you can state what that substance is, on the examination which you are now making?

A. I don't know whether I can answer that yes or no; I cannot answer yes or no.

- 40 *Q.* Are you familiar with the product thrown out of an engine burning soft bituminous coal? *A.* Yes, sir.

Q. How does the substance contained in the envelope in the Exhibit shown you compare in appearance and character with such substance as you are familiar with as being emitted from an engine burning soft coal?

A. It has the same appearance.

Q. I show you what has been offered in evidence as Ex. 13, substance contained in this envelope, and I ask you the same questions in reference to that which I have asked you in reference to the last Exhibit, and are your answers the same? *A.* It has the same appearance, except there are some heavier particles than ordinarily are given out in the smoke; there are some that you might call cinders in here, that is pieces, burned fuel.

Q. And with that modification, are your answers the same as you gave with reference to the previous exhibit about which 10 I interrogated you? *A.* Yes, sir.

Q. I show you a piece of wall paper which has been marked in evidence as Plaintiff's Ex. 15, and ask you if the accumulated substance on that piece of wall paper is what you are familiar with as the substance emitted from an engine burning soft coal? *A.* I wouldn't like to say what that was.

CROSS-EXAMINATION, by Mr. WALL:

Q. Professor, you have not made any study of the supply of anthracite as against bituminous, and the effect that the general 20 adoption of the use of anthracite would have?

A. No, sir; I think I can say no to that.

Q. Have you ever been in England? *A.* I have, yes, sir.

Q. Do they burn anthracite coal in England? *A.* Not that I know of.

Q. Do they on the French railways burn anthracite coal?

A. I don't know, sir.

Q. Your impression is what, from general information.

A. I have no impression about that at all.

Q. Do you know any place in the world where they burn 30 anthracite in locomotives except on the Lackawanna railroad?

A. The Jersey Central.

Q. Do they burn it all over on the Jersey Central? *A.* That I don't know; they burn it on the Jersey Central, I know that.

Q. With those exceptions, so far as you know, no anthracite is used ordinarily, is there? *A.* There are some sections, probably, of roads that may burn anthracite, some locomotives on railroads that may burn anthracite; in other words, I have seen an odd locomotive burning anthracite.

Q. Now your study of fuels has been along the line of your 40 particular pursuit? *A.* Yes, sir.

Q. It has been to determine the value of fuels in their steam and gas producing qualities? *A.* Not only that, no, sir. To

determine besides that the efficiency of boilers, efficiency of grates, whether or not a certain grate would make smoke from a certain coal, and also whether certain coals would smoke on certain grates.

Q. But that has to do with the question of economy, either of your fuel or of your engine, or the efficiency of the fuel, doesn't it? *A.* No, not all.

Q. What else? *A.* Smoke prevention also.

Q. Why? *A.* Many of these municipalities, and owners too,
10 don't want smoke.

Q. Why don't they want smoke? *A.* Injury to city property, and owners injure their own property in their own plants by having smoke fall on their goods; for instance, a tannery cannot afford to have smoke, carbon, fall on their skins while drying.

Q. Special situations? *A.* Yes, sir.

Q. But you have never made a study of fuels in relation to health, you are not a doctor? *A.* No, sir.

Q. You don't know about the effect of different fuels in relation to the human body, for instance? *A.* Only my own observations.
20

Q. You are a mechanical engineer, aren't you? *A.* Yes, sir.

Q. Has bituminous coal any superior steaming qualities to anthracite? *A.* Yes, sir.

Q. It has? *A.* Yes, sir.

Q. Is it a better coal to run an engine with so far as pulling your train and getting through with your day's work?

A. Yes, sir.

Q. What advantages has it as a fuel? *A.* It has the advantage that it has more heat in it per pound of coal, and you can burn more of the coal on the same sized grate, for instance; thereby you can get more power out of a given engine than you could with anthracite coal; in that same connection, of course, it has the additional advantage that it costs less money per ton.
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Q. It costs considerably less, doesn't it, per ton than anthracite?

A. I would call it considerably less, yes, sir.

Q. Now, what in your opinion would be the effect on the price of anthracite coal if the railroads of this country should suddenly take to burning anthracite?

Mr. Hardenbrook—Objected to by complainant for the reason that the witness has not shown himself to be competent to testify as to the value and cost of various kinds of coal.
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A. I have already testified I didn't have the experience of

knowing what the relation between the soft and hard coal of the country was; therefore I could not tell you the effect if the railroads started to use it.

Q. You couldn't say whether the price of anthracite would go up or down? *A.* I don't believe I could say it.

Q. Now the terms bituminous and anthracite are like many terms of that kind, there is not a sharp line of demarcation between them, is there?

A. There isn't a sharp line, though it has been fixed by practice.

Q. And it grades all the way down by the most infinitesimal degree from anthracite down to the softest kinds of bituminous coal? *A.* Yes.

Q. Now then, the difficulty with the engine fire in controlling the smoke exit or escape, as compared with a stationary fire, is very much greater in the case of a locomotive fire? *A.* Yes, sir.

Q. The difficulty with the locomotive fire is the conditions of movement, and exposure of the fire, and the way the boiler has to be constructed, and a number of other things?

A. There are a number of things that do that.

Q. It is a practicable thing to make a smoke consuming device that will prevent the objectionable feature of the escape of soft coal smoke from factories and stationary plants?

A. Yes, sir.

Q. And such a device has not been discovered that would do the same office for a railroad locomotive?

A. I don't know of any; there has none been installed that will do it.

Q. And quite extensive experiments have been employed, have been made to get such a device? *A.* I believe so; I don't know that we know the results of the experiments.

Q. What in your opinion are the main basic difficulties which a person who is running a locomotive fire is confronted with to prevent the escape of smoke as compared with the fire under a stationary engine?

A. The principal main difference in my opinion would be the great amount of work that is expected of a locomotive engine and boiler at a particular time, which is not expected of the stationary plant, and which of course is due to the fact, or could possibly be overcome by smaller work being required of a locomotive, which would put it in the nature of a stationary engine and boiler.

Q. You speak of the rush of cold air when fresh coal is put

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upon the fire, can that rush of cold air be entirely eliminated in the nature of the case?

A. Not in the way you fire, no, sir.

Q. You were shown certain samples there, you never have examined those samples, except just as you saw them here?

A. No, sir, never saw them before.

Q. And your testimony with respect to them is based on just the fact that you have seen the residuum of coal smoke which resembled these samples, isn't it? *A.* Yes, sir.

10 *Q.* And apparently there is considerable dust mixed with the particles of coal, or whatever it is?

A. What do you mean by dust?

Q. What we call dust around the house, dirt which evidently did not come from an engine? *A.* No, I couldn't say that.

Q. Didn't you see any such thing? *A.* I didn't see any such thing. I wouldn't say there isn't any, but I didn't see it.

Q. Those larger pieces or cinders which you referred to, are they such as would come out of a locomotive?

20 *A.* They will come out of a locomotive under possibly certain conditions.

Q. Unusual conditions, wouldn't it be? *A.* No, more likely the condition of perfectness of the engine.

Q. You mean what? *A.* Well, that there may be something the matter with the spark arrester.

Q. Can you say that those cinders came from an engine with which there was something the matter? *A.* No, sir; I say it resembles what might be from some such.

RE-DIRECT EXAMINATION, by Mr. HARDENBROOK:

30 *Q.* Would a properly constructed engine emit cinders such as you saw in the exhibit shown you? *A.* I think it might under very heavy work, yes, sir.

Q. You were asked as to this rush of cold air by counsel, and I believe you stated that it could not be eliminated by the method of firing which was in use—could the rush of cold air be eliminated by any other method of firing than is used by the railroad company?

40 *A.* That becomes a question of a sort of economy of operation, efficiency of a locomotive when it might be using what might be called a smoke consumer; from experiments that have been made so far there has nothing been devised, that was satisfactory, to the railroad companies at least; in other words, to feed the coal in with a smoke consumer will not give them the work out of a locomotive that they desire.

Q. What product is emitted which is observable in the burning of anthracite coal? *A.* There are gases of a slight color; carbonic acid gas; there might be a few cinders come out with it; of course, the largest part that comes out is steam.

Q. Steam and gases? *A.* Yes, sir.

Q. And what are the color of those gases? *A.* Bluish color, light color.

Q. Just what distance after leaving the mouth of the smoke stack are those substances which are observable disseminated in the air to the extent that they pass out of sight?

A. I don't know the distance; they are observable for no appreciable length of time.

Q. What would you say as to the distance?

A. The number of feet you would stand from the locomotive?

Q. No; you say there is a grayish or bluish substance which is observable which is emitted from the smoke stacks in the burning of anthracite coal, coupled with some steam?

A. Yes.

Q. How soon after leaving the smoke stack would they disseminate in the air to the extent that it would not be observable?

A. I should think twenty-five feet; it would be all gone before that.

Q. That would be the maximum? *A.* Yes, sir.

RE-CROSS EXAMINATION, by Mr. WALL:

Q. The gases in anthracite are as unpleasant as the gases in bituminous? *A.* As far as the bases go they are very much alike in the two coals, the difference being one is unburned; it is the unburned part that is unpleasant in the soft coal.

Q. Now what is the color of the so-called dense black smoke from soft coal? *A.* It is a sort of a grayish black.

Q. It is not real black? *A.* It could be black, but it may not be absolutely black.

Q. As a matter of fact the so-called dense black smoke which is emitted from the stack of a locomotive is not black against the sky? *A.* I would call it black against the sky.

Q. Would you? *A.* Yes, sir, as a sort of comparison against the sky. It has the same effect as black with a little white bunched in, which will give a grayish effect, but is called dense black smoke.

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RE-DIRECT, by Mr. HARDENBROOK:

Q. You are familiar with what is known as lamp black?

A. Yes, sir.

Q. And lamp black is pure unconsumed carbon, is it not?

A. Yes, sir.

Q. And the commercial lamp black with which you are familiar how does it differ from the unconsumed carbon in color and substance from the unconsumed carbon emitted in the burning of soft coal? *A.* No difference.

Q. Same thing? *A.* Same thing.

RE-CROSS, by Mr. WALL:

10 *Q.* But not the same thing as to color? *A.* Same thing.

Q. You don't mean to say that the smoke from an engine burning soft coal is as black as lamp black? *A.* I don't say that; that was not what he asked me.

Q. What you are testifying to is that the article that is called unconsumed carbon is unconsumed carbon?

A. That is my answer.

Q. And whether it is unconsumed carbon in coal smoke or lamp black, it is still identically the same thing?

A. Yes, sir.

20 By Mr. Hardenbrook—I offer in evidence on behalf of complainant certified copy of the ordinance of the city of Jersey City, adopted by the Board of Aldermen, and approved by the Mayor, on the 23d day of February, 1909.

Mr. Wall—Objected to by plaintiff on the ground of irrelevancy and immateriality; that the ordinance in question has no bearing whatsoever on the issues involved in this case.

Marked Plaintiff's Exhibit 29. J. H. C., September 6, 1911.

REV. B. KWIATKOWSKI, being heretofore duly sworn, testimony resumed:

RE-DIRECT, by Mr. HARDENBROOK:

Q. Will you describe, Father, the uses which are made by the Pennsylvania Railroad of the tracks on the south side of Sixth street, immediately opposite your school and rectory on the block between Brunswick and Monmouth streets?

40 Mr. Wall—Objected to by defendant, it has all been gone into before.

A. Yes.

Q. Describe what use is made of those tracks, so far as you have observed, opposite your windows?

A. Opposite this church property the Pennsylvania Railroad, around 1902, has changed their tracks, and instead of having two tracks as before, since they built that stone wall they have made an ordinary switchyard there; since that time we have much more noise and smoke, and this damaged our property in very bad shape.

Q. About how many additional tracks were laid there if you know? *A.* The tracks as I counted was about eight; but besides that there is so many switches made, I couldn't count how many switches are there. 10

Q. You are speaking now of the block opposite your church property? *A.* Opposite the church property, yes, and the cars stop there too.

Q. What are those tracks occupied by, so far as you have observed? *A.* Freight cars.

Q. Are they standing or moving cars? *A.* Moving, and standing sometimes; sometimes they stop there, and I can see the standing cars, many of them, and moving in all directions; they built that about 1902, that wall, I believe.

Q. And laid these additional tracks? *A.* Yes, sir. 20

Q. Have you made any memoranda of the numbers of engines, with the dates and hours, which you have seen standing on this block opposite your church property?

A. Yes, a record of it.

Q. Have you that memoranda with you? *A.* Yes, I have.

Q. Made at the time? *A.* Yes, sir.

Q. State what your memoranda shows? *A.* June 30, 1911, engine 1436, 6.30 A. M., very big noise, wakes me up, and I see heavy smoke; train consists of over eighty cars.

Q. Freight cars? *A.* Freight cars, yes. 30

Q. Did you make any other memoranda? *A.* Same morning, No. 2767, locomotive standing, and emitting extreme black smoke, locomotive standing 25 minutes. Same morning, number of locomotive 1652 at 7.50 same morning, standing with heavy black smoke, 15 minutes.

Q. Go right along? *A.* July 20, No. 1098, 6.42 A. M., passing, moving, and emitting tremendous smoke, very noisy puffing.

Q. For how long? *A.* Fifteen minutes.

Q. Does your memoranda show that it was for fifteen minutes? 40

A. Yes. Engine No. 3150 at 6.47 same day, evening; passing, big smoke and noise.

Q. Does your memoranda show any length of time for that?

A. No, I only observed passing here. No. 2262, at 6.50 passing, smoke and big noise. I only observed on those two days simply to show to the court that smoke and noise.

Q. Now, have you with you Father, any book containing an account of the various amounts of money which you have been compelled to expend in paint and repairs upon the church property in the last few years? *A.* Yes.

Q. You have such a book with you? *A.* Yes, sir.

10 *Q.* Is that a book of original entry—is that a book in which you first made your entries? *A.* Yes, sir, expenses and income.

Q. You have your income from the church on one side and your daily expenses for the church property on the other?

A. Monthly expenses.

Q. And that is the book in which you first entered, that the only book you have? *A.* The only book I have.

Q. You kept that yourself? *A.* Yes, I kept that.

Q. In your handwriting? *A.* Yes, sir.

Q. And those entries in the book, are they correct as to the various amounts you have expended at various times?

A. Yes, sir.

Q. For expenses in repairs and painting?

A. Yes, sir.

Q. What is the first entry you find in there, Father?

A. This book starts at 1903.

Q. What month? *A.* January.

Q. Now go on as rapidly as you can, just call off the various dates and amounts which you expended; if the memoranda shows whether it was for the church or the school or the rectory, just give us that statement in connection with the entry?

30 *A.* In 1903, July, I paid \$36.00 to repair the leaders, tin leaders.

Q. What condition were those tin leaders in at the time?

A. It was eaten full of holes.

Q. Go right along? *A.* In November, repairing roof on the school.

Q. Tin roof? *A.* No, the roof is slate, but only around the leaders is tin.

Q. Flushings? *A.* Yes. They were tin, \$65.00.

Q. What was the condition of those? *A.* They were rotted.

40 *Q.* Go on. *A.* I bought the organ in 1902, and in 1904 I have to pay Ruben \$391.71 to repair that organ on account so much dust was right in the organ pipes.

Q. Did you see the dust which was taken out of those organ pipes. *A.* Yes, I see it.

Q. How did that dust compare in character with the substance which you have offered in evidence as Plaintiff's Ex. No. 12 and Ex. No. 13, which I asked Professor Pryor about?

A. The same black stuff.

Q. Go on? *A.* I paid E. Denning, October, 1903, \$240.74, for paint, church and school.

Q. Inside or outside? *A.* Inside the church and school.

Q. Go right along. *A.* October, same year, Dixon Crucible Company, paint, for to paint the school, \$7.63, \$9.75, and \$19.80; that was for paint; I hired the painters, paid them \$330.00 for the work.

Q. For putting on the paint? Yes, painting the school and church.

Q. You don't mean to say that you paid \$330.00 for putting on \$19.80 worth of paint? *A.* No, the paint cost, \$240.74, \$7.63, \$9.75 and \$19.80.

Q. These items were for paint exclusively? *A.* Yes.

Q. Now you paid how much to the painters? *A.* \$330.00. 20

Q. That \$240.74 was paint? *A.* For paint.

Q. Paint or painting? *A.* Paint.

Q. Go right on? *A.* 1904.

Q. What month? *A.* April, Menagh for paint.

Q. How much? *A.* \$24.05, paint; I hired the painter.

Q. How much? *A.* Painter, \$54.00.

Q. For painting what? *A.* The altar.

Q. What was the condition of the altar at that time?

A. It was black, all spoiled; I have to paint it.

Q. Go right on? *A.* Same painter, in May, 1904, \$18.00. 30

Q. What work? *A.* Same work.

Q. What did he do? *A.* Painting altar; Menagh, \$41.62 in May, 1904, for paint. May, 1904, National Sheet Company to repair roofs above the sacristy, \$69.75.

Q. What roof is that, what kind? *A.* Tin roof.

Q. What was the condition of it? *A.* It was rotten.

Q. How long had it been on, do you remember? *A.* I don't remember.

Q. Go on? *A.* In July, 1904, Ruskin, for painting, \$44.00.

Q. Painting what? *A.* The school, class rooms. 40

Q. Inside? *A.* Inside.

Q. Do you remember the condition of them? *A.* Black, I must paint.

Q. Go along, Father? *A.* Now, 1905, April, painting class-room, \$45.00.

Q. Same class rooms? *A.* Not the same; I have not so much money for one time; Menagh for paint, \$25.84.

Q. When was that? *A.* Same time.

Q. Go on? *A.* National Sheet Company, June, 1905, \$47.11.

Q. For what? *A.* Repairing roofs.

Q. What was the condition of it? *A.* It was rotten, have to put new.

10 *Q.* Go on next? *A.* In October, 1905, to repair leaders on the school, \$68.70.

Q. What was the condition of them? *A.* All spoiled, rotten.

Q. Go on? *A.* In December, 1905, painting church, \$200.

Q. Interior? *A.* Interior.

Q. What was the condition of it? *A.* It was black, I have to paint.

Q. Go on? *A.* July, 1906, to repair roof, leaders and cornices on the church, \$162.31.

Q. What was the condition of them? *A.* Rotten.

20 *Q.* Go on? *A.* National Sheet Company, September, 1906, to repair roof, \$100.00.

Q. What roof? *A.* I have not got it here, on the roof or on the school, I could not tell you; it says repairing roof.

Q. Go on? *A.* 1906, October, to buy paint, \$7.25. Dambrowsk to repair roof on the school house, \$221.19.

Q. What date? *A.* October, 1906.

Q. What was the condition of the roof? *A.* It was rotten.

Q. Go on? *A.* 1906, December, to paint for the rectory, Menagh, \$87.68; to buy wall paper for the rectory, \$89.50.

30 *Q.* What was the condition of the wall paper there at that time? *A.* It was too dirty, I have to put new paper and some rooms have to be painted.

Q. Dirty from what cause so far as you know?

A. From the smoke of the railroad; it was too black.

Q. Run along? *A.* For work in the house, \$208.00; in March, 1907, I paid Zaorski for paint work, painting in the rectory.

Q. What was the condition of the paint? *A.* It was black; I have to renew.

Q. Black from what, if you know? *A.* Smoke.

Q. Go on? *A.* April, 1907, Zaorski, \$148.00.

Q. Doing what? *A.* Some work in the house, painting, re-decorating.

Q. What was the condition of that paint at that time which you had done? *A.* It was black.

Q. From smoke? *A.* From smoke.

Q. Run along? *A.* 1907, June, tinsmith, Dambrowski, for work on the school roofs, \$175.00.

Q. What was the condition of them? *A.* It was rotten.

Q. Go on? *A.* Dambrowski again, October, 1907, \$130.00.

Q. For what? *A.* To fix and repair the roofs on the school and on the church.

Q. What was the condition of them? *A.* Leaking.

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Q. What is this Dambrowski's business? *A.* Tinsmith.

Q. Go on, the next? *A.* December, 1907, Zaorski, painter, painting class rooms \$96.00.

Q. What was the condition of them? *A.* It was black.

Q. From what? *A.* Smoke.

Q. Go on? *A.* June, 1908, Dambrowski, tinsmith, \$62.55.

Q. Repairing what? *A.* Repairing roofs on the church.

Q. What was the condition of it? *A.* It was leaking.

Q. Go on? *A.* John Menagh, June, 1908, for paint, \$20.90, for class rooms.

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Q. In the school? *A.* In the school.

Q. What was the condition of them? *A.* Black.

Q. From smoke? *A.* Smoke.

Q. Go on? *A.* 1908, September, to painting the school, for work, the painters, class rooms, \$348.00, and paint, \$144.00.

Q. Same date? *A.* Same month, September.

Q. What was the condition of those class rooms? *A.* All black, must be painted.

Q. Black from what? *A.* From smoke.

Q. Who did you buy that paint from? *A.* From Menagh.

Q. Go on? *A.* In December, 1908, to buy paint, \$13.00.

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Q. For what? *A.* For the same work, class rooms in the school.

Q. Go ahead? *A.* 1909, February, Zaorski, painter, \$193.

Q. Painting what? *A.* Inside the church.

Q. What was its condition? *A.* Dirty from smoke.

Q. Go on? *A.* April, 1909, Zaorski, again, \$100 for painting, I got no memoranda for that; books don't show what this painting was.

By Mr. WALL:

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Q. Do you claim the railroad company should pay what you have no memoranda for?

A. If I go by the bills I can produce exactly for what. Zaorski produced that bill; at different times I make the payments to him.

By Mr. HARDENBROOK:

Q. Go on? *A.* May, 1909, Zaorski, \$50.00.

Q. Does it show for what? *A.* No, it does not show for what.

Q. Go on? *A.* To paint the sacristy, Zaorski, \$42, 1909, in August, 1909.

10 *Q.* What was the condition of the sacristy? *A.* Black.

Q. From what? *A.* Smoke.

Q. Go on? *A.* The item of April, 1909, to Zaorski for \$100 was for painting the church.

By Mr. WALL:

Q. You don't know that from anything in the book?

A. I know that from the book only I didn't put exactly in this for what.

20 *Q.* On what page of that book does it show that that \$100 that you paid on Zaorski was for painting the church?

A. Because it was no other work done in this time.

Q. On what page of that book does it show that that \$100 that you paid on Zaorski was for painting the church?

A. Page 145.

Q. Now read us out the item on page 145? That is, to church, \$100, Zaorski, painter.

Q. It does not say on page 145 that the \$100 was paid to Zaorski for painting the church? *A.* There is nothing said here, but it is next payment to him, how much I paid him.

80 By Mr. HARDENBROOK:

Q. Did Zaorski do any painting other than in the church?

A. Not in this time, only the church this time.

Q. Was that same thing true of the item of \$50.00, in May, 1909, paid to Zaorski? *A.* Yes.

Q. Also for the church? *A.* Yes.

Q. And in August? *A.* Same thing.

Further hearing in this matter adjourned to Friday.

September 8, 1911, at 10.30 A. M.

United States District Court, District of New Jersey.

ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA,
Complainant,
vs.
THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant.

Testimony.

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Testimony taken in the above-entitled matter, before Hon. George R. Beach, Examiner, appointed by order of Judge Joseph Cross, at his office, 75 Montgomery street, Jersey City, New Jersey, on the 8th day of September, 1911, at ten thirty A. M.

Appearances—Mr. FRANK HARDENBROOK, of counsel for the complainant; Mr. ALBERT C. WALL, of counsel for defendant.

Continuation of direct examination of Rev. B. KWIATKOWSKI:

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By Mr. HARDENBROOK:

Q. When we closed on the last hearing, Father, you had, as I recall it, given a statement of your various expenses in papering and painting, repairing roofs on the church and school and rectory, down to August, 1909—do you find in your record anything spent for wall paper subsequent to August, 1909—you have an entry there of October, 1910, for wall paper?

A. In 1909, I don't see any other items for repairs for paint; no other items in 1909 than I have testified.

Q. Now, in October, 1910, do you find an entry of an expenditure by you for wall paper? A. Yes, \$123.00. 30

Q. And that wall paper was used there? A. For the rectory.

Q. That was to replace old paper? A. Yes.

Q. What was the condition of the old paper?

A. It was all black from the smoke and must be changed.

Q. Do you find an entry of an expenditure made by you in August, 1910, for the organ?

A. The organ? I have to repair the organ; it was full of cinders from the railroad, black stuff.

Q. In August, 1910? A. Yes.

Q. For how much?

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A. The organ was out of order on account of this stuff and I have to call Mr. Ruben what is to do, and he did the work, and I paid him for it \$179.50.

Q. Now, in October, 1910, this man Zaorski, your painter, did some work on the rectory? *A.* He did; he painted the rooms and put up the papers.

Q. And his bill he testified to? *A.* Yes, he testified to it already.

Q. You paid him? *A.* \$465 or \$485.00, I don't know which, but his testimony as to which of those two figures it was is correct.

Q. What was the condition of the rectory at the time he did this painting and papering in 1910?

A. It was too black from the smoke and I have to repaint and paper.

Q. In July of this year, 1911, were you called upon to do some more painting? *A.* Of this year, yes. I have to protect the outside cornices, because it was corroded; I was afraid to lose it, and I hired the painters and bought the stuff; paid over \$160, and the painters around \$160.00 up to now. The work is not done yet.

20 By Mr. WALL:

Q. Have you got any bills *A.* Not with me.

Mr. Wall—Defendant objects to the evidence.

By Mr. HARDENBROOK:

Q. These painters are still at work? *A.* Yes.

Q. But you have paid so far on account of the work which they are doing \$160.00? *A.* Yes, sir.

Q. And that work for which you paid \$160.00 for painters, and for which you paid \$60.00 for paint, was work on what?

30 *A.* On the schoolhouse.

Q. Inside or outside? *A.* Outside.

Q. And what was the condition of it when this work was started?

A. All black, all the cornices and little towers, all black from the smoke.

Q. What was the average number of children attending your school last year, Father? *A.* Eleven hundred children last year.

Q. And has the school year opened now? *A.* Just now, we opened this week. Tuesday, this week.

40 *Q.* That would be the 5th of September? *A.* Yes, sir.

Q. What is the attendance which you find now in your school?

A. I have not got only eight hundred children.

Q. Do you find, or has it been your experience, that the full

complement, or full number of children, appear on the opening day of school, or do they come in later?

A. Generally, then come all in the first week; now we have not got so many children as before.

Q. My question is, do they usually come in in the first week, and not gradually fill up during the fall and winter? *A.* No.

Q. It don't gradually fill up during the fall and winter, they all come in in the first week, generally?

A. They all come in in the first week.

10

RE-CROSS EXAMINATION, by Mr. WALL:

Q. What was the figure of the school average for September, 1910? *A.* Around eleven hundred.

Q. How do you know that? *A.* Because I know it.

Q. Do you keep track of it? *A.* Yes.

Q. You yourself keep track of it? *A.* Yes.

Q. How do you keep it? *A.* I go and see.

Q. Isn't there any book kept? *A.* Yes, sir.

Q. You don't keep that? *A.* I do.

Q. Do you keep that with your own hand—I ask you whether 20 you yourself with your own hand kept that?

A. No, I didn't need to do it.

Q. You never counted the children? *A.* I did.

Q. When did you count them? *A.* I must know how many children I got in the school.

Q. When did you count the children last? *A.* This week.

Q. You went in and counted them yourself? *A.* I know how many in the class.

Q. Do you know what count means? *A.* Yes.

Q. What does it mean, you didn't ever count the children 30 yourself, did you?

A. I don't know what you mean by that, to count the children—of course, I have to count them.

Q. Did you ever go in and look at the children and count them, one, two, three, four, five, and so on?

A. I see how many children in the class rooms.

Q. Did you ever do that yourself, or have one of the Sisters give you the figures? *A.* I know myself.

Q. Did you have one of the Sisters give you the figures?

A. I go the class room and count how many children is there. 40

Q. When did you last do that? *A.* To-day is Friday, I was there on Tuesday.

Q. And when you counted them, how many were there?

A. Around eight hundred.

Q. You don't remember exactly? *A.* I don't say exactly.

Q. Did you write it down anywhere? *A.* In the schoolhouse. I added how many in each class room.

Q. Is there any one of the Sisters that keeps a list of the children? *A.* We have a record book.

Q. You said that the church itself had grown very much in the last few years? Been a very successful church?

A. It is a successful church.

10 *Q.* It has grown in numbers during the last few years?

A. Not growing in numbers.

Q. Didn't you already testify that? *A.* No.

Q. Didn't you? *A.* No.

Q. Now, when you don't understand my questions I want you to call my attention to it, I don't want you to answer questions you don't understand. *A.* I understand.

Q. Now, then, none of this painting and none of these expenses would have been incurred by you, or by the church, unless the Pennsylvania Railroad smoke had been there, would they?

20 *A.* Not in this extent.

Q. I didn't ask you that? *A.* Yes.

Q. You would have had to do some painting and you would have had to do some repairing, whether there was a railroad there or not? *A.* I will.

Q. You would have? *A.* Yes.

Q. So from all these things which you have given us there should be deducted, subtracted, from all those, that which you would have had to expend anyway, whether there was a railroad there or not? *A.* Well, yes.

30 *Q.* Now, what do you say is the amount that you would have had to expend anyway? *A.* I couldn't say that.

Q. You don't know? *A.* I don't know.

Q. You have no means of telling what the cost of running that great plant of church and school and rectory, and keeping up the repairs, would be if there were no railroad there?

A. Of course not.

Q. Why didn't you have copper leaders put in? *A.* Too expensive.

40 *Q.* The galvanized iron ones are a great deal more expensive when you keep putting them in all the time, aren't they?

A. I have not enough money to put them in in the beginning; the galvanized iron cost much less than copper.

Q. Haven't you heard the witness say that the copper would

last twenty-five years, and the copper only costs 65 to 75 cents a foot as against 25 cents for the galvanized iron, and the galvanized iron only lasted four years—isn't it cheaper for you to put in copper that would last twenty-five years?

A. I couldn't afford to pay three times more.

Q. Now, some of these expenses are for decorations, aren't they? *A.* For painting.

Q. And some of them are for painting where there had been no painting before? *A.* No.

Q. Now, think about that? *A.* In the beginning when I built 10 I have to paint first, and after a few years I would have to paint again, because it was all black.

Q. Now, wasn't there any painting which you might call new painting—for instance, weren't there any holy figures painted there? *A.* No.

Q. Weren't there any frescoes put in that you didn't have at the beginning?

A. The church was done about ten years ago; it was frescoed, painted, and after two years this fresco and paint was all gone; then I have to paint all in white, all in white, because it was too much money to paint again and get the church in the same condition as it was before. On account of the big expense I couldn't do it. 20

Q. Now, do you say that every dollar of this money has been spent for replacement of old work and none of it has been spent for things which you didn't have before, that is, new things—do you understand my question?

A. I don't understand entirely what you mean.

Q. Do you understand what I mean by replacement?

A. Yes, I understand that. 30

Q. What I mean is this: When you painted with white paint something that had been painted with white paint three years before, then you were doing the same thing over. But some of the painting, some of the decorating that you did was new, didn't take the place of some old decorating, some old paint. I mean as to these items which you have testified to. Was that for any new work, or for all old work?

A. If you call new work, when it is black already, when the wall are already black, I will say that after two years after the building is finished, inside of two years it was so black I couldn't use it any more, because it was too black in the school and in the house and church; otherwise I could wait two years longer. 40

Q. Well, I didn't ask you that. Among these expenses that you have testified to, do you say there are no expenses for new decorations? A. Maybe some expenses, but not so often.

Q. You don't know what they are? A. No.

Q. Do you say there are no expenses for new work in all these expenses which you have testified to?

A. They are expenses for new work—in these items, new work? I don't understand what you mean by new work. It must be done. Didn't I tell you already that if I build something and inside of two years I must paint because it is all black and smoked and dirty.

10 Q. What I mean is this: If you have a room painted white and the room gets dirty, and you have to paint it white again, that is a replacement of old work. If you have a room painted white and the room gets dirty, and then you paint it with a fancy border around the top, that is new work, that fancy border. Now, I say haven't you painted any new work in the painting that is included in these expenses? That is hard to say?

A. That is not to hard to say, but you put it in such a way. You mean exactly the same paint as it was before?

20 Q. You don't understand what I mean by replacement of new work?

A. I understand replacement—the same thing exactly. I don't know—if I have to paint, and get the painter and say change the color.

Q. Don't you see the difference between plugging up the hole in the old kettle and getting a new kettle of different shape?

A. Yes.

Q. There is a difference? A. Yes.

30 Q. Now, I am asking you whether all these expenses that you have testified are expense like plugging up the hole in the old kettle, or whether some of them are for expense like expenses for new kettles in different shape? A. To repaint.

Q. The paint is for repainting? A. Yes.

Q. But repainting sometimes of a more expensive kind than the first painting? A. It might be.

Q. Your church is improving all the time in beauty and decorations? A. No.

Q. You are getting other things?

40 A. No, I can not put anything more expensive there because I spent already one time around \$1,500, and inside of two years I have to get it all done again, and then nothing expensive; I can't spend more money in the church or school or rectory, because it wouldn't last long on account of that black smoke.

Q. When did you spend that \$1,500? *A.* About ten years ago, it was. Then after a while I have to change that for simply white.

Q. Ten years ago? *A.* It was decorated ten years ago.

Q. When did you spend the \$1,500? *A.* I told you about ten years ago, and then it was painted white, about two years after that.

Q. The railroad was there ten years ago? *A.* Yes, the railroad was there.

10

RE-DIRECT, by Mr. HARDENBROOK:

Q. You say the railroad was there ten years ago—what changes and alterations have been made in the railroad since ten years ago, so far as you know?

A. Since ten years ago they built this stone wall, that starts at Brunswick street, all over my block there, and put a switch-yard, regular switchyard there, and on account of that it increased the smoke and damages to my church and church property.

Q. The number of trains have increased.

20

A. The number of trains have increased and especially the switches in the switchyards; there are so many cars there I call it that, standing, and going this way and the other way, making a big amount of smoke and damage.

Q. That condition did not exist ten years ago?

A. No, they only had two tracks.

RE-CROSS, by Mr. WALL:

Q. You mind the noise as much as the smoke?

A. Yes, the noise is awful there; we could not sleep.

30

Q. Can't you sleep now? *A.* What do you mean, now?

Q. You know what I mean—do you think I asked you whether you were asleep now? *A.* No.

RE-DIRECT, by Mr. HARDENBROOK:

Q. In counting these children which the counsel asked you with reference to, the number of children in the school, I ask you what method you adopted in counting the children—each class accommodates a certain number?

A. Each class room accommodates so many children, some fifty, some sixty, and one class seventy-six children.

Q. And the method you adopted in counting these children was in counting the number of class rooms with so many children in each class room? *A.* Yes, sir.

40

Q. You didn't count each individual child by itself?

A. I see so many pews were in the class room.

Q. See the seats occupied in the class room? *A.* Yes.

Q. And without counting you know that that class room contains, say fifty pupils?

A. It is easy to count how many seats are occupied in the class room, and in each seat are two pupils, and I know how many children are in the school.

Q. And by going from class room to class room you can readily **10** determine how many pupils are in the school, the total number of pupils without counting each one? *A.* Yes.

RE-CROSS, by Mr. WALL:

Q. What you really object to is that there is more of this than there was ten years ago—more noise, more trains?

A. I don't know as there are more trains, but there is more noise and more smoke; I see more trains and cars standing opposite the property, the church property.

Q. You don't know whether there are more trains than there **20** used to be? *A.* I don't know whether there are more trains; I never counted how many trains the Pennsylvania Railroad had.

Q. You are not able to say whether there is more traffic than ten years ago? *A.* I don't know.

Q. You are not able to say whether there is more traffic there now, more passing and repassing of trains than there was ten years ago? *A.* Oh, yes, more passing, more cars and more engines.

Q. Well, that is what I mean, that is the trouble, is it?

A. Yes.

30

DOCTOR PHILOMEN E. HAMMELL, called as a witness by complainant, being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. You are a regularly licensed physician practicing in the city of Jersey City, doctor? *A.* Yes, sir.

Q. For how many years? *A.* Eighteen years.

Q. Your office is where? *A.* 689 Bergen avenue, near Duncan avenue.

Q. Does your business call you in the neighborhood of Sixth street in Jersey City? *A.* Yes, sir, in that neighborhood.

Q. You are familiar with the location of the Pennsylvania Railroad tracks on the south side of Sixth street, Jersey City?

A. Yes, sir.

Q. Between Brunswick and Monmouth streets, on Sixth?

A. Yes.

Q. Upon this elevation? *A.* Yes, sir.

Q. What have you observed in the way of smoke being emitted from those engines at any time?

Mr. Wall—Objected to by defendant.

Q. What have you observed personally as to the operations of the railroad on Sixth street?

Mr. Wall—Objected to by defendant as his testimony 10 is not competent, not being qualified as an expert; question too general, not shown to have any reference whatever to the questions in the case.

Q. Go on, doctor, what have you observed in reference to the operation of the trains?

A. I have noticed considerable smoke, resulting from imperfect combustion—black smoke.

Q. Coming from the engines? *A.* Yes, coming from the engines.

Mr. Wall—Defendant asks to have that stricken out 20 on the same ground as before.

Q. What does this smoke consist of, if you know?

Mr. Wall—Objected to by defendant on the ground that he is not qualified as an expert.

A. The smoke consists of carbon, finely divided carbon, oily and tarry products, the result of imperfect combustion.

Q. These oily and tarry products, are they carried with the carbon?

A. Chemically. That is, if the smoke is examined with a microscope, you will find that the finely divided carbon or soot— 30

Q. Did you ever examine any of it under a microscope?

A. I have examined it, yes, sir; the finely divided carbon is surrounded by an aureole of oil and tar.

Q. Do you know from your experience as a physician what effect, if any, the breathing of this product which you have seen emitted from the engines of the railroad company has upon the health of the people?

Mr. Wall—Objected to by defendant as too general, as irrelevant and not connected with the case at hand.

A. Why, the breathing of air contaminated with smoke is irritating to the mucous membrane, mucous lining of the upper and lower air passages. 40

Q. What effect does that irritation have?

A. It is likely to cause a catarrhal condition that may lead on to degenerative changes.

Q. Any cough incident to it? *A.* Very likely, if the mucous lining becomes irritated by these particles of carbon.

CROSS-EXAMINATION, by Mr. WALL:

Q. Doctor, those are possible results that you have mentioned?

A. Well, where people live—

Q. No, answer the question?

10 *A.* Well, I will answer it; people who live in a neighborhood where there is a smoke nuisance will become catarrhal; I have patients of that kind come to my office every now and then, breathing impure air.

Q. You are testifying as a physician generally as to the effect of irritating causes on the mucous membrane? *A.* Exactly.

Q. You are not pretending to testify that this smoke or any smoke that you saw coming from the Pennsylvania Railroad at this point actually caused those troubles to people that you know of—that is not your purpose now, is it?

20 *A.* It certainly is; I have met with them.

Q. Name the persons and name the time.

A. There is a young man right opposite here, in the Lincoln Trust Company; he has hay fever, and his condition is very much aggravated; I was speaking to him yesterday.

Q. What is his name? *A.* Mr. George.

Q. What is his first name? *A.* I don't know.

Q. Where does he live? *A.* He works for the Lincoln Trust Company.

Q. Where does he live? *A.* He lives up near me somewhere,

30 I think, Bergen avenue.

Q. He doesn't live in this section? *A.* No, but he works in this section, and I find his condition is being aggravated by the smoke of the soft coal.

Q. How do you know that that is what aggravates his condition? *A.* It aggravates my condition.

Q. How do you know that that is what aggravates his condition? *A.* I assume it.

Q. From what? *A.* From his symptoms.

Q. What are his symptoms?

40 *A.* His symptoms are the symptoms of hay fever; they are worse now than they would be if he were out of town in a more congenial atmosphere. He would not suffer as much as he does.

Q. Do you mean to swear as a respectable man of science that

the conditions which he is suffering from are due to the smoke emitted by the Pennsylvania Railroad? *A.* I can't blame anything else.

A. I can't blame anything else.

Q. Do you mean to swear, on your oath, that this is a fact, that it comes from the Pennsylvania railroad?

A. I would assume so, because the smoke is in the atmosphere steadily here, and in my own case, I have catarrh.

Q. Then your oath as a physician is that of your own knowledge you know that his catarrhal condition, this man George, is due to the smoke emitted by the engines of the Pennsylvania railroad?

A. Aggravated condition; I would say that all catarrhal conditions can be aggravated by an atmosphere rendered impure by smoke resulting from soft coal.

Q. Or, in this case, from the pollen of roses, perhaps?

A. Pollen of rag weed.

Q. From the pollen of roses? *A.* Well, most any pollen would affect the membrane of the nose; that is the ethiological cause of it.

Q. You mean eito-etiologal? *A.* Primary cause of the trouble.

Q. Is that the word you mean? *A.* Ethiological, I think that is right.

Q. Now, I repeat the question, your oath as a physician is that of your own knowledge you know that his catarrhal condition, this man George, is due to the smoke emitted by the Pennsylvania railroad? *A.* An aggravated condition.

Q. (Question repeated.) Is your oath as a physician, that of your own knowledge you know that his catarrhal condition, this man George, is due to the smoke emitted by the engines of the Pennsylvania railroad?

A. I believe that his aggravated condition is due to the presence of the soft coal in the air that he is breathing around this neighborhood that is all I want to say about it.

Q. Suppose you answer the question—you understand, do you that the question applies to the Pennsylvania railroad and not to any other railroad?

A. Well no; of course there is soft coal smoke from other places here; I might change that and modify it and say the soft coal smoke from various places in this vicinity; there is Colgate's and different other manufacturing industries.

Q. Do Colgates burn soft coal? *A.* I don't know.

Q. Then why do you say under oath that Colgates are burning soft coal when you don't know? *A.* They may use it; I have not investigated it very thoroughly.

Q. Have you investigated it at all—at all? *A.* I have not been down there.

Q. Have you investigated it at all? *A.* To the best—

Q. Can't you say yes or not? Have you investigated it at all?

A. I have not seen any black smoke.

Q. Have you investigated it at all, why don't you say no?

10 *A.* Well, don't holler at me so.

Q. If you tell the truth I won't holler at you.

A. I assume that they are burning soft coal.

Q. Have you investigated it at all, yes or no? *A.* Well, no.

Q. Well, let us save a little time by getting to the truth sooner in the game after this. What you mean to say is that any impurity in the air, whether occasioned by soft coal or by hard coal or the pollen from plants, will irritate an already irritated membrane, such as one with hay fever suffers from? *A.* There is nothing—

20 *Q.* Do you mean that? *A.* No, sir; there is nothing irritating about the smoke of hard coal.

Mr. Wall—I object to the witness continuing at after the question has been answered.

Q. Did you ever cure a case of hay fever? *A.* No, sir, nor any one else.

Q. Does anybody know what hay fever comes from? *A.* They assume that it is a disease—

Q. Does anybody know? *A.* Not positively.

Q. It has been the despair of the medical profession, hasn't it?

30 *A.* For centuries.

Q. And it has generally been supposed that it is very much aggravated by particles of dust, and flowers, and vegetation, etc., coming in contact with the mucous membrane?

A. It depends altogether on what kind of dust it is; if it was dust in the form of smoke that is finely divided carbon, it would cause more irritation.

Q. Than what—than goldenrod? *A.* Than goldenrod, yes, sir.

Q. How do you know that? *A.* I use common sense.

40 *Q.* How do you know that? *A.* If you get some soft coal smoke up your nose it will start you sneezing. Hay fever is a disease of the Sniderian membrane; the upper one-third of the nose is the seat of the trouble in hay fever; irritating particles aggravate the trouble.

Q. Whatever the particles are, almost anything will irritate it, won't it? *A.* Finely divided carbon—

Q. No, no, why don't you answer the question instead of trying to get in this thing about carbon?

A. Ordinary dust would not aggravate it at all.

Q. Not at all? *A.* Very little.

Q. Vegetation will irritate it? *A.* The pollen of flowers will.

Q. Isn't that vegetation? *A.* That is vegetation, yes, sir. That is, I don't believe myself that all pollen will produce it—certain kinds.

10

Q. Haven't there been many instances where people have suffered from this disease where they were far away from the possibility of any of these irritating particles?

A. I would regard them as scarce; I have never met with them.

Q. And there are many members of the medical profession that think the disease is due to a disorder of the blood?

A. I have heard and read that it is neurosis, some trouble with the nerve supply to that membrane; I think that is the trouble myself.

Q. Doctor, where were you graduated? *A.* Bellevue.

20

Q. In New York? *A.* In New York.

Q. What was this examination you made of the soft coal dust?

A. Why, I experimented not long ago with a little smoke, held a microscopical slide over a smoke flame; I examined it to find out how it would look; I found small particles of carbon and surrounding the particles some oily and tarry products.

Q. When did you do this? *A.* Some months ago.

Q. That was a flame in your own house?

A. Oh, yes; didn't examine any smoke from here, just to see what it would look like.

30

Q. You took the flame of what character? *A.* A kerosene lamp, was not burning very well; just to get the flame.

Q. You put the glass over it? *A.* Yes, sir, and got the soot on it.

Q. And examined it under an ordinary microscope?

A. Yes, sir, to see what it was.

Q. And those conditions that you testified to were with reference to that examination? *A.* Yes.

Q. You cannot point, doctor, to any instance of illness coming from the Pennsylvania railroad smoke in the vicinity of this Roman Catholic Church, you don't mean to testify to that.

40

A. No.

Q. And this case of Mr. George—is that the only case of the kind that has been called to your attention?

A. I have a case in my own family; my sister suffers from catarrh, and when she comes down to do some shopping the condition is very much aggravated, and I can testify to the same in my own case; the atmosphere is not as pure down here as it is up on the hill.

Q. That was always so with low lying places along the river?

A. Where there is plenty of soft coal smoke, as down here, it 10 is true; it is certainly not a very healthy place; if you have a little catarrh, as I have, it aggravates it.

Q. Don't most people in this vicinity have a little touch of catarrh, isn't it quite rare to find people free of it?

A. I don't think such a great many.

RE-DIRECT, by Mr. HARDENBROOK:

Q. You testified about the general atmospherical conditions containing smoke in this neighborhood, do you refer to the immediate neighborhood in which this testimony is now being taken?

A. Yes.

Q. That is, to 75 Montgomery street, this place where we are now sitting? *A.* Yes.

Q. About how far distant is that from the Pennsylvania railroad on Sixth street? *A.* From here?

Q. Yes? *A.* Oh, half a mile, I guess.

RE-CROSS, by Mr. WALL:

Q. You are talking about conditions in the lower part of Jersey City? *A.* Yes, sir.

Q. You are not talking about the conditions on any one block?

A. No, the lower part of the city.

HEXOMIN DAMBROWSKI, called as a witness on the part of complainant, being duly sworn according to law, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

Q. What is your business? *A.* Tinsmith.

Q. Whereabouts? *A.* Jersey City.

Q. Whereabouts? *A.* Coles street.

Q. How long have you been in that business? *A.* Ten years.

Q. Are you the man who did the repairs upon the church and school and rectory of St. Anthony's church, at Sixth street and Monmouth and Brunswick streets, Jersey City? *A.* Yes, sir.

Q. During what period of time did the repairs which you have done to those three institutions or buildings cover, about how many years? *A.* I repaired them last year.

Q. I didn't ask you last year—about how many years have you been doing that work? *A.* For ten years.

Q. For the church and school and rectory? *A.* Yes, sir.

Q. During that time you have done what?

A. Repaired the roofs, cornices, leaders.

Q. They are commonly known as tin leaders?

A. Galvanized iron.

10

Q. What is the roof? *A.* M. F. tin.

Q. When you call it M. F. tin, it is not tin plate, it is a composition of iron?

A. It is called tin, I don't know how the difference is.

Q. What have you done in repairing these roofs and leaders and cornices, and what condition have you found them in?

A. I find the condition is little pin holes just like a sieve; the water runs outside the leader and strikes the building, or comes through the holes down on the ground.

Q. Do you know from your experience as a tinsmith what causes those little pinholes in the leaders and roofs? *A.* Yes, sir.

Q. What? *A.* The smoke there, the ash coming from the smoke stack goes on the roof and lays there, and that rots the tin.

CROSS-EXAMINATION, by Mr. WALL:

Q. These leaders run up and down, don't they. *A.* Yes, sir.

Q. Do you mean that the smoke stays on the leaders that run up and down?

A. I mean that that ash from the smoke stack goes on the leader, the wind carries it over on the leaders and gutters.

33

Q. If it were not for that these galvanized iron leaders would last forever? *A.* I don't think so.

Q. How long would they last?

A. Six or eight years; that depends on the material.

Q. It all depends on the material? *A.* Yes, sir.

Q. You never saw any holes in any leaders only just on this church—did you ever see any holes in any leaders except on this church and right around there? *A.* Yes, sir.

Q. You have seen them lots of times? *A.* Yes, sir.

Q. Everywhere? *A.* Yes, sir.

40

Q. It is bad business to put in galvanized iron leaders when copper is as cheap as it is now?

A. Copper is not cheap, not so cheap as tin.

Q. What is copper now, do you know?

A. It is eighteen cents and twenty-two cents a pound.

Q. Isn't that cheap for copper? A. Twenty-eight cents may be.

Q. Now I ask you if you have not found these pin holes in galvanized iron leaders all over, wherever they use them?

A. Yes. One word, certainly they do, but not so bad like they have it on the school house; some places they stay five or six or eight years, but these leaders we have to change every two years, because they rotted so quick.

10 Q. Don't most people put in copper instead of galvanized iron?

A. Yes, sir.

Q. The copper wouldn't have these holes in it would it?

A. Not so soon.

Q. How many years for copper?

A. Fifteen years, twenty years.

Q. You have seen them up longer than that, haven't you?

A. Oh, yes, sir.

Q. Now why do you say then that the little holes in the leaders would come from the smoke and the ash? A. Yes.

20 Q. Why, why do you say that? A. I say that, because if it rains and that leader gets wet or damp, everything that comes from the engine sticks in the leader and dries there and eats that leader.

Q. How do you know that? A. That is my experience.

Q. How do you know it? A. I know it because I find it out; there is nothing else.

Q. You think it must be that? A. I am not thinking at all; I state it right; it is no use for me to think; I am twenty-eight years in the business, ten years at it in Jersey City.

30 Q. What makes the little holes in the places where there is no coal smoke? A. I don't know; that might be from the sewer.

Q. Lots of things might make the little holes? A. I don't know that.

Q. You don't know what may make these little holes?

A. I certainly do; didn't I tell you before?

Q. You said that leaders have those little holes in them at places where they don't have any coal smoke?

A. I didn't say that.

Q. Do you say then that they only have the little holes in
40 them where there is coal smoke? A. Yes, sir.

Q. You say that? A. Yes, sir.

Q. Then you say these galvanized iron leaders will last al-
right——

A. It is up to the material.

Q. If there is no coal smoke near? A. They don't rot off so quick.

Q. What makes the little holes? A. The ash from the smoke.

Q. What else makes the holes? You don't understand my questions. You say the ash makes the little holes in the leaders. You also say that where there are no ashes that in time the little holes will come in the leaders? A. Yes.

Q. Now what makes the little holes in those places—the places where there is no ash?

10

A. Because there are so many years, they must be gone, but not so soon; but I can't explain that, how long is that leader been put on. I say I can only tell about this property here of Father Kiwiatkowski, that he owns; I do the work for the last ten years, and I know what time I put on the leaders and how long they last and what is gone.

Q. How much do the galvanized iron leaders cost a foot?

A. Twenty-five to thirty-five cents a foot.

Q. How much do copper leaders of the same size cost?

A. Sixty-five to seventy-five cents a foot.

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Q. So then, you say the galvanized iron leaders only last two years there? A. Yes, about that.

Q. You don't mean to say all the leaders you put in were all used up in two years? A. No.

Q. If you give them good stuff they will last longer?

A. Three or four years.

Q. How long would the copper last?

A. I cannot explain to you because I am not long enough in this place to know how long the copper will last here.

Q. What do you think?

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A. I think they can last for twenty-five, twenty years, maybe more; I am not positively sure how long they can last.

The complainant closes, reserving the right to produce one more witness, an engineer, to testify as to the firing of a locomotive engine with soft coal.

Further hearing in this matter adjourned to Thursday, September 14th, at 10.30 A. M.

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United States Circuit Court, District of New Jersey.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Defendant.

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(*Filed December 26, 1911.*)

Defendant's Proofs.

Testimony taken in the above entitled matter, before Hon. George R. Beach Examiner, duly appointed by order of Judge Joseph Cross, at his office, 75 Montgomery street, Jersey City, New Jersey, on the 14th day of September, nineteen hundred and eleven, at two o'clock P. M.

Appearances—MR. FRANK M. HARDENBROOK, of counsel for complainant; MR. ALBERT C. WALL, of counsel for defendant.

By Mr. Wall—Defendant offers in evidence the Laws of 1832, page 96, of the New Jersey Legislature, in reference to the New Jersey Railroad and Transportation Company.

Mr. Hardenbrook—Complainant objects to the same on the ground that it is irrelevant, incompetent and immaterial.

Mr. Wall—I also offer in evidence the Laws of 1868, page 551.

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Mr. Hardenbrook—Same objection.

Mr. Wall—I also offer in evidence certified copy, certified the 13th day of September, 1911, by the Secretary of State of New Jersey, of the award and report in the matter of Commission for determining the compensation the State ought to receive for certain lands under water in Harsimus Cove, Jersey City, the originals of which were filed in the office of the Secretary of State of New Jersey on the 11th and 12th days of November, 1869, and the 22d day of December, 1868.

40 Mr. Hardenbrook—Same objection.

Marked Def't's Ex. 1.

Mr. Wall—I also offer the lease of the New Jersey

Railroad and Transportation Company to the Pennsylvania Railroad Company, and the act validating the same, from the Laws of 1873, page 1298.

Mr. Hardenbrook—Same objection as before.

Lease marked Deft's Ex. 2.

JOHN D. CAMPBELL, called as a witness by the defendant, being duly sworn, on oath testified as follows:

DIRECT EXAMINATION, by Mr. WALL:

Q. Where do you live, Mr. Campbell? 10

A. At 344 East 141st street, New York City.

Q. What is your business? A. Engineer and machinist.

Q. And what has been your experience?

A. I have always been engaged in that business; the past eleven years engaged in general work of all kinds, automobile, etc.

Q. Have you given any attention to the study of the use of soft coal on railroad locomotives? A. I have, yes, sir.

Q. What is your judgment as to the possibility of avoiding the use of soft coal for locomotive engines? 20

Mr. Hardenbrook—Objected to by defendant on the ground that it is immaterial, irrelevant and incompetent.

A. Soft coal is the standard fuel of the world; the other fuels, including anthracite, are incidental fuels—coke, products such as are used only incidentally; the anthracite field and supply is but a very small spot in the whole field of fuel throughout the world; very small section of Pennsylvania.

Q. Is that the only anthracite coal deposit in the world?

A. Yes, sir. There are so-called anthracite peak coal in Alaska, and a small field in Kentucky, and, I am told, some in China; they are small and merely a semi-bituminous coal; that is, a little bit harder than our common bituminous coal is; it is not hard; on the same character of coal as the cannel coal of England is; but it is not an anthracite coal. 30

Q. Is it practicable for the engines of this country, locomotive engines of this country, to use anthracite coal?

Mr. Hardenbrook—Objected to on the ground that it is irrelevant, immaterial and incompetent.

A. If you will allow me to qualify my answer, the field or amount of anthracite coal that is known to-day is so limited that if the roads, say, east of Chicago, were to use it, the field would be very soon exhausted. Now, there is a second problem in 40

using anthracite; that the business of the country is so pressing, so large, and its requirements so pressing, that anthracite coal used alone, leaving to one side the question of the visible supply, the business of the country as represented by the railroads could not be operated without increasing very largely their train service, which would add to the cost of doing the business of this country.

Q. Why is that?

A. The anthracite coal is a very slow burning fuel; its heat units is higher than bituminous coal, but with bituminous coal instead of burning a pound slowly upon the outside, bituminous coal is broken up and you are burning a pound of coal in three or four different places, so that the capacity for doing work or producing work by bituminous coal is far greater, in my own experience, from two to three times, in a given time, more than it is from anthracite coal of a given weight.

Q. What do you mean by that exactly, when you speak of the bituminous coal being broken up and burning in more places than the anthracite coal burns in?

A. The ordinary anthracite coal used in the few roads that use it—only two roads that use it, and those only partially—partial train service—use what is called steamboat coal, which is a little bit larger than this (referring to gavel which witness is holding).

Q. You are now referring to the head of the gavel?

A. Yes, sir; that can only burn on the outside; it will crack and split up after awhile, but the combustion is on the outside only. Now, on the first-class trains the selected coal, bituminous coal, the coal of the same weight would be divided up into four or five pieces, which would therefore burn five times quicker, give out five times the heat that the piece of anthracite would.

Q. Suppose you made your pieces of anthracite as small as the pieces of bituminous, what would be the effect then?

A. It will not burn as quick as soft coal does.

Q. Do you know when anthracite commenced to be used at all.

A. Anthracite coal was first commenced to be used in about 1830; it went along for domestic purposes only till about some time in the early fifties, the Delaware and Lackawanna and Western Railroad was built to Binghamton from Scranton, to make a connection with the Erie, to find a market for the coal; the Delaware, Lackawanna and Western was the only road with a small service, and the Lehigh Valley also tried to burn anthracite coal; both these roads were using wood in many of the

locomotives up to 1860 or about that; in this time I was on the Erie road, with my father, or under my father, was very active in developing the first coal burning locomotives, which was for anthracite coal; they gradually changed to coal burners; the service on the road was light; not many frequent trains; but in 1867 to 1868, in the third cycle of development in the railroad service, the Erie was compelled to take up soft coal and use that as fuel to meet the requirements of the service.

In 1871 I became identified with the Elizabethport shops of the Central Railroad of New Jersey; that road at that time was an anthracite road, with but few passenger trains and light freight service. We could not at that time run a passenger train to Easton with one firing of anthracite coal; it had to be cleaned half way, about Somerville. The New Jersey Central had their own mines of anthracite, but as business increased they of late years have had to take up soft coal for fuel to meet the requirements of the service.

Q. Are you familiar with the type of engines used on the Pennsylvania railroad between Jersey City and Trenton?

A. In a general way, yes, sir; in a general way.

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Q. Could those engines be put in service and use anthracite coal?

A. I would have to go back to all the statements I made before. The present locomotives, if using anthracite coal, would not be able to meet the demands of traffic.

Q. Why not? *A.* Beg pardon?

Q. Why not?

A. Because with anthracite coal they could not generate sufficient power in a given time; we will assume that trains have a given time in which to do their work, we will say, between here and Philadelphia, and a freight train with sixty cars must do that in four hours; if anthracite coal was put in there to do that in that time they would have to cut that service down one-half to do it in the same time; the anthracite coal could not be consumed quick enough to furnish sufficient power for those sixty car trains in four hours.

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Q. Would any change have to be made in the size of the fire box if you wished to use anthracite coal?

A. There would have to be an entire change made if they decided to use anthracite coal and perform the same service which is obligatory to-day upon every railroad; the dimensions of the fire box would have to be so largely increased that with

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the limitations put upon the size of the locomotives, would make it so that you couldn't do it.

Q. Why is it that anthracite engines require a larger fire box?

A. On account of the slow burning of the fuel. Coming back to my previous statement—

Mr. Hardenbrook—I object to witness answering further on the ground that he has answered the previous question asked by counsel.

I said that the difference between anthracite and bituminous, 10 the power it could furnish, heat and generate, in a given time, was about one to three of bituminous coal. Assuming that each square foot of grate bar can furnish a certain power in a given time, then for anthracite to furnish the same power would require three times that.

Q. Now Mr. Campbell, why is there smoke from the burning of bituminous coal?

A. That is due to an imperfect combination of carbon and oxygen; the condition under which that combination takes place is so fixed that there has nothing been devised—and they have

20 been trying since 1825—that has met the varying conditions of atmosphere and qualities of fuel; now it takes one pound of carbon—will unite with two point six of oxygen to make proper combustion, but it will only make that combination under a given temperature; we do not know exactly what that temperature is. Duncan C. Clarke gives it some place between 3,000 and 4,500 degrees of heat. The investigations made in France by automobile manufacturers have come to the same conclusion. It may seem strange to us that even the flame from a match of gas jet, that there is a temperature, infinitesimal in its range, of some place between 300 and 4,500 degrees of heat. Then we have got in addition to that the atmospheric conditions. Now, to-day, remember that air is not depending upon quantity but upon weight for combustion. Now, to-day, at noon to-day, we have got the means of admitting or controlling a certain amount of air for combustion. Now, our temperature will fall by midnight to-night probably thirty degrees; now we are getting in increased quantity of air at midnight; the difference between thirty degrees and what it may be just now. The quantity you admit is not the temperature but it is weight, 40 and the weight is dependent upon its temperature.

Mr. Hardenbrook—Complainant moves to strike out the answer of the witness as not being responsive.

Q. Does an engine burn bituminous coal smoke continuously as it runs?

A. Roughly speaking, to-day, with the increased knowledge that they have got, while we say that locomotives are smokeless, they are not; they will always emit some smoke, and at times more than others.

Q. Now, what are the times when they emit smoke?

A. An engine laying with a dead fire, a low fire, in the yard, will be giving off smoke in small quantities. A locomotive with a train having a hard pull up a grade, turning the hill and turning down, be shut off, will give off smoke.

Q. On the decline, or up grade?

A. On the decline. On the level, with a constant load, constant speed moving along on a level tracks, then the smoke is down to its minimum.

Q. Just describe why there is smoke under those different conditions?

A. In the locomotive laying in the yard, the temperature which I have mentioned before is so low that the coal only fries in that and the smoke is not prevented; you cannot consume smoke, all you can do is to try and prevent it. When the locomotive takes a train to start out the fire box and tubes are filled with tarry bituminous matter; the exhaust ejects that and other smoke created until the fire brightens up; coming up a grade the draft is so intense that the fire is very bright and but little smoke is given off. Going down grade the exhaust is not used, but if the fire falls below the combining point then smoke is given off.

Q. What would be the result if you didn't have the draft?

A. Couldn't use the locomotive. I spent ten years in experimenting to get something that will make steam.

Q. What can you say as to the amount of sulphur in anthracite as against bituminous?

A. There is not much difference between them; all coals vary; bituminous and anthracite vary according to the location, varying 3 to 5 per cent. of sulphur; it is the same way with bituminous coal; it varies according to the mine, about 4 or 5 per cent. Anthracite coal in the Lehigh Valley would be about 94 per cent. of carbon, 3 or 4 per cent. of ash and volatile matter. Some of the Pocahontas mine would be about 90 per cent. of carbon, and 3 or 4 per cent. sulphur and bituminous ash enters into the rest.

Q. Do you know if the government has give any special attention in the navy to the use of coals and the kinds of coals?

A. The government, like all governments to-day, has given

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that very careful attention, for their batteries, which is the most important thing they have to deal with.

Q. Why?

A. Because smoke is an indication of where their location is; they took up smokeless powder for the same reason, to avoid showing where they were; and the other question becomes one of economy, one of storage; there is a value to this so-called smoke as a fuel; and if smoke could be prevented it is money in their pocket, to the government or the individual, and saving of carrying space in the vessel.

10 *Q.* Have they been able to eliminate the escape of smoke from bituminous coal when they are starting up or under-going additions to their fires similar to locomotive fires?

A. In building up their fires and starting out they make a good deal of smoke. After the fire gets incandescent and they are making 35 to 40 miles an hour there is very little smoke. I saw one of the United States dreadnaughts a couple of weeks ago going down the East river making a tremendous smoke, only because they were starting up the fires and getting started, **20** and probably when they got out as far as Sandy Hook there was no smoke at all.

Q. How about a bonfire in the street?

A. A bonfire in the street carries out exactly that elementary condition, that has never been changed in physics. There is a bonfire in the street; if we accept the theory that air is all that is required to prevent smoke, then the bonfire, being in the open air, it would seem as though there should be no smoke, but when that bonfire is started we have a tremendous smoke; when it is all aflame we have not got it, and when it is dying out and cooling down again we have got the embers there, then **30** we have the smoke again. Now, this theory that when sufficient air is put into the fire box there will be no smoke, can be exploded by this simple question of the bonfire.

Q. How about lighting a match? Is the same true of a match?

A. I have made many experiments; after making experiments myself for thirty-five years; I was at one time when a young man a sort of an advocate of the admission of air, and it cost the railroads a good many dollars to carry out my ideas before I found out I was mistaken. You strike a match and when it ignites you get smoke for a moment, as it burns up there is no smoke, as the flame is dying out you get more smoke again. You have exactly the same conditions; it requires temperature **40** to make the combination.

Q. And when the temperature is low, there is smoke, is that it?

A. Yes, Mr. Wall; heat is produced by two particles coming together, one of carbon and two point six of oxygen; the velocity in which they come together depends entirely upon the attraction; the temperature of the heat produced depend upon the velocity. You have heard the roar of the flame; it is only the particles coming together, striking each other; that is what the roar is.

Q. Now, then, Professor Pryor, testified on behalf of the church in this case, on page 351 of the transcript of evidence 10 as follows:

Q. Will you explain why or how smoke comes from engines burning soft coal?

A. In firing a boiler it is necessary for us to open the firing door in order that the fireman may put the coal on the grate, in doing so a large amount of cold air rushes in and tends to cool the fires; at the same time the coal, having more or less small particles with it, fall into the crevices between the fire and cut off the air supply from below the grate; both the cold air and cutting off the air supply from below the grate, will not allow the volatile matter in the coal to completely burn; the non-burning of this volatile matter, which carries carbon is what makes soot or smoke.

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Q. Do you agree with that statement? *A.* I do, sir.

On the same page he was asked by the counsel for the church:

Q. What is the occasion, or what causes the puffing of an engine, and the throwing out of dense quantities of smoke at the starting of an engine, when an engine starts up?

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A. In the starting up of an engine the exhaust steam coming from the cylinder comes out in the stack; the engineer in order to start his engine will have to open up his throttle wide, which emits a great quantity of exhaust steam; this large quantity of exhaust will make a considerable draft on the fire, and if there is any coal unburned at the particular time, it naturally draws up such unburned products from the fire-bed.

Q. Do you agree with Professor Pryor in that statement?

A. I do; yes, sir.

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Q. Has there ever been any device which, for a locomotive engine, would obviate the difficulty of attaining the right temperature when the fire is beginning as you have described, or when the fire is cooling off as you have described?

A. No, sir; there must be a beginning to everything, and that beginning cannot be a maximum condition; it must be an initial condition.

Q. Have you given any thought or made any investigation as to how much greater the trackage or mileage of the Pennsyl-vana railroad between here and Philadelphia would be if bitumi-nous coal were abandoned as fuel?

A. I made a rough estimate of that some years ago, not only on the Pennsylvania but on the New York Central; at that time, 10 my belief was that the capacity of trackage and mileage would have to be increased over one-third; of course, that was only a rough estimate.

Q. For the causes that you have mentioned in your testimony, the course of your testimony here?

A. Upon the lack of power of anthracite fuel to do the work in a given time.

Q. Would that apply to the trackage and mileage both?

A. Yes, sir, because the roads, their tracks are already over-crowded, and to put any increased trackage on their present 20 tracks, they would have to put in more tracks to take care of it.

Q. Why are trackage and mileage not identical terms?

A. The mileage—suppose a track of a mile long had five trains on it, and that was the capacity of that track to handle those trains with safety; now to put three more on; you couldn't put three more on so to handle three more trains, you would have to provide another track to handle those three trains.

Q. Now, how about the gases given off by anthracite coal?

A. Mr. Wall, gases given off by any fuel, or by any person, any living person, is a perfect or nearly perfect carbonic acid 30 gas; imperfect combustion which really takes place, is carbonic oxide; now, anthracite gives off the same carbonic acid gas as bituminous, the same combustion, but it is not visible; we do see the gas in bituminous but we do not see it in anthracite.

Q. Did you ever make any experiments with a train burning anthracite coal and moving at a fair speed, and with its fire in what you have termed the incandescent state, to determine what a drop in the temperature would do to your fire in its smoke producing property?

A. I have taken a train, with a mechanical engineer with 40 whom I had a discussion on this combustion question; both a freight and a passenger train that was moving along with just a little bit of smoke, what we would say no smoke, and to show him that the temperature was the necessary and real thing to

do, to maintain a temperature to get perfect combustion, I opened the door for less than a minute.

Q. What door?

A. The fire door, and immediately produced intense smoke; I closed it and it stopped.

Q. What was that due to?

A. That was due to the cooling down of the temperature in the fire box below the combining point.

Q. And by combining point you mean the point to attain perfect combustion? *A.* Yes, sir.

Q. Have you ever known any instances where death has resulted from anthracite, from the gases from anthracite coal used in houses or factories?

A. Only through the press; we have had last winter here a family asphyxiated by coal gas from that; of course, there is always a danger; with the bituminous coal, in the Western States, my brother tells me, they don't have any trouble.

CROSS-EXAMINATION, by Mr. HARDENBROOK:

Q. What is your business?

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A. We are engineers and machinists, now, in 64th street.

Q. Sixty-fourth street. *A.* Yes, sir, 300 East 64th street.

Q. Who are you employed by?

A. I am my own employer, my own shop.

Q. You operate the machine shop? *A.* Yes, sir.

Q. What is the character of your business, what do you make?

A. We are doing general work, work of all kinds; it would be very hard to specify just what our work is.

Q. You don't build locomotive engines? *A.* Oh, no.

Q. Can you specify in a general way, without going into elaborate details, as to what kind of work you do?

A. We repair pumps, steam engines, automobiles, and make machinery of all kinds.

Q. How long have you been engaged in that business?

A. About ten years.

Q. The past ten years? *A.* Yes, sir.

Q. And prior to that?

A. Prior to that I was about four years general manager of the Dixon Locomotive Works.

Q. At Scranton? *A.* Scranton. Yes, sir.

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Q. And what were your duties there as general manager.

A. To design and build locomotives.

Q. What type or character of engines does the Dixon Locomotive Works build? *A.* All kinds.

Q. Hard coal burners and soft coal burners? A. Yes, sir.

Q. How long were you with the Dixon Company?

A. About four years.

Q. Prior to that who were you with?

A. Prior to that I was about four years master mechanic of the Buffalo and Susquehanna, and before going there, assistant of motive power on the New York Central road.

Q. That your first employment?

A. Then before going with the New York Central I was on 10 the elevated roads, upon which I was master mechanic, and four years superintendent.

Q. What elevated roads? A. Manhattan.

Q. That carries you back how many years?

A. To about 1876 or 1877; and previous to that, I commenced my work on the Erie; I was locomotive engineer in the south for a number of years, and then a number of years on the New Jersey Central until I went with the elevated.

Q. Do you mind stating your age, Mr. Campbell?

A. Sixty-five years.

Q. You say the field of anthracite coal is limited to certain sections in the State of Pennsylvania? A. Yes, sir.

Q. And that all the anthracite coal we have in this world, so far as we know, except the exceptions you made as to Alaska, is that contained in Pennsylvania?

A. A little in China, and in Alaska; a little vein in Kentucky.

Q. Limited extent? A. Yes, sir.

Q. Do you know as to whether there is any anthracite coal in what is known as the Gunnison country in Colorado, I don't mean county?

30 A. Yes, sir; I know it is not; it is a semi-bituminous coal.

Q. Semi?

A. Yes, because I built locomotives in that section; there is no anthracite coal as we understand it; a very superior grade of semi-bituminous coal; I am not sure about the county.

Q. What is the area or extent of the anthracite coal mines or section of Pennsylvania?

A. I couldn't tell you the exact area, but I can tell you where it runs from, from Carbondale south.

Q. You don't know the area? A. No, sir.

40 Q. Do you know the quantity of anthracite coal, estimated quantity at the present time in Pennsylvania?

A. No, I do not; I know what the coal people put out, the visible supply, how long it will last. The length of time that the field will last.

Q. There are dense sections of coal land in Pennsylvania which have not been opened as yet?

A. No, sir; I beg pardon, let me change that; the Reading road has some properties they have not drawn upon yet.

Q. And with that exception all the coal land, all the known coal land of Pennsylvania has been opened up, with that exception?

A. All the land is known, not opened; part of the Philadelphia and Reading road properties have not been worked yet.

Q. Isn't there large sections of what is known as coal land 10 which have not been opened as yet at all?

A. No, sir; not except that little section that belongs to the Philadelphia and Reading railroad; don't draw me too close on that; for instance, there is a vein they may not have touched yet, but they know it is there.

Q. The dimension of a coal vein varies from point to point?

A. Yes, sir; the different veins vary, but not from point to point; the different veins vary in depth, but if a vein is three feet at this end it will be three feet at the other.

Q. Assuming that a track of coal land is five miles in extent, 20 and assuming that it was opened on each of the sides and not anywhere else, would there be any accurate way of determining the quantity of coal in the intermediate parts between the two sides?

A. Yes, the coal properties have mining engineers carefully drilling to determine that; it is a peculiarity of anthracite coal, it runs down a mountain side, comes down a mountain side and crops out on the other side; so you can always start in on a vein here and find it over there; except one or two veins at Hazelton. Cox properties, where they are taking to top off to get at the 80 veins there.

Q. And by taking the top off they can make an accurate estimate as to the extent and width of that vein as it extends down into the earth?

A. They took the old top off; they had worked about thirty or forty feet below the surface; they took the top of the earth off to get down and get what was left of the columns that was, under the law, for safety, left to support the mine when they were working it.

Q. That answer which you have just made referred to these 40 two exceptions which you have made; the answer which you have made is confined to the two exceptions you have mentioned? A. The Cox properties, back of Hazelton.

Q. Is there any way to accurately determine the quantity of coal underneath a vein of coal which has been opened on the top?

A. They don't open the top to get the vein; they open it to rob the old vein; they don't take off the top to mine it, but to take out the old columns; the price of coal warrants them in doing that to-day.

Q. Answer my questions, Mr. Campbell, is there any way you can accurately determine the amount of coal underneath a vein which is opened on the top?

10 *A.* The vein is opened on the top only as I told you, to protect the old columns.

Q. I didn't ask you what it was done for?

A. I couldn't answer that.

Q. There is no way of determining whether a vein widens out or narrows up?

A. Yes, I will say no exception to that rule; a vein will run the same from one end to the other.

Q. That is not true of every mining enterprise?

A. It is not true of bituminous, but it is true of anthracite;

20 when I see six inches or ten inches here, it will be the same there.

Q. What roads are there now which are using anthracite coal in their locomotive engines?

A. The Delaware, Lackawanna and Western; the New Jersey Central and Philadelphia and Reading, in some of its service only.

Q. And are those the only three roads using anthracite coal in their locomotive engines?

A. Those are the only three I know of.

30 *Q.* When did the Delaware, Lackawanna and Western first commence to use anthracite coal in its engines?

A. Some place about 1850.

Q. And they have continuously used it down to the present time?

A. Not on all locomotives. On the freight locomotives they use soft coal mixed with buckwheat.

Q. What is the percentage of that mixture?

A. I don't know; I only know what the railroad men say; I would not like to say that.

40 *Q.* Then you don't know that the Delaware, Lackawanna and Western use a mixture of hard and soft coal?

A. Not of my own personal knowledge.

Q. When did the Central Railroad of New Jersey first commence the use of hard coal in its locomotive engines so far as you yourself know? *A.* About the same time.

Q. About 1850?

A. Yes, about 1850; the first engines were wood burners.

Q. They first commenced to use anthracite about 1850?

A. Yes, about that.

Q. They have used that continuously down to the present time?

A. On the passenger trains, but soft coal on the freight service.

Q. You know that of your own knowledge?

A. Yes, I saw that.

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Q. All of them?

A. The greater part of them, most all of them.

Q. What portion of them?

A. That I couldn't say; only my observation going over there; I know that on the first class passenger trains they are using anthracite coal.

Q. On the freight trains they are using soft coal?

A. Those that I saw.

Q. Entirely? A. That I couldn't say.

Q. To what extent do they use soft coal in their engines?

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A. That I couldn't say.

Q. Upon what do you base your statement that the Central Railroad of New Jersey uses soft coal on the freight trains?

A. Because in going through their yards I see soft coal in the yards in the tanks.

Q. How often have you gone through the yards of the New Jersey Central railroads?

A. Probably once in a year, in the last year.

Q. You went about once in the last year? A. Yes, sir.

Q. How often in the year previous?

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A. Probably not over a couple of times; probably not for a couple of years.

Q. That carries you back three years; prior to three years ago how frequently did you make observations as to what freight trains on the New Jersey Central were using soft coal?

A. That I couldn't say; couldn't keep track of all that I am doing daily.

Q. You know whether you were there at all or not?

A. From time to time because I was associated with people of that road and I went there.

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Q. You say you have gone there once in the last year?

A. Probably once in two years.

Q. And before that how often?

A. I couldn't say, I am sure.

Q. Did it average any more than that?

A. Probably might be two or three times in the year; just depends upon whether my business took me over there or not.

Q. You based your statement that the New Jersey Central is using soft coal upon the observations which you made at the times about which you have now testified? A. Yes, sir.

Q. The Lehigh Valley, I believe, uses anthracite?

A. Yes. I ought to have said the Lehigh Valley; I forgot that.

10 Q. They also use anthracite? A. Yes, sir.

Q. About how long has the Lehigh Valley used anthracite coal?

A. The Lehigh Valley railroad has used anthracite coal since about 1850; they all commenced to find out about the same time that they could use it.

Q. And they have used it continuously to the present time?

A. The Western end is not using it, but I am very sure on this end it is all anthracite coal.

Q. You are familiar with the type of engine used in the Delaware, Lackawanna & Western road, the anthracite coal burners?

A. With the type of fire box—the Wooten fire box.

Q. What is the size of that fire box?

A. Average size eight by ten feet.

Q. And do the New Jersey Central and Lehigh Valley both use the same type of fire box?

A. The Lehigh Valley are using it on their engines.

Q. Same size? A. About the same size.

Q. All three roads use about the same size?

A. Yes, sir; the New Jersey Central uses the Wooten box 30 too, about the same size.

Q. You are familiar with the fire box used by the Pennsylvania railroad upon the engines burning soft coal?

A. I was six or seven years ago.

Q. Not since then? A. Not since then, no.

Q. Has there been any change so far as you know in the fire box in the past six years? A. Not as far as I know.

Q. What is the size of the fire box used by the Pennsylvania railroad upon the engines burning soft coal?

A. They were forty-two inches by about nine feet long.

40 Q. Forty-two inches by about nine feet? A. Yes, sir.

Q. Are you familiar with the relative amount of traffic or the difference in the amount of traffic going out of Jersey City and Hoboken between the Delaware, Lackawanna & Western and the Pennsylvania?

Mr. Wall—Objected to

A. No, sir.

Q. You don't know whether one is greater than the other?

Mr. Wall—Objected to by defendant as outside the limits of the direct.

A. No, sir.

Q. I believe that you testified, Mr. Campbell, that the emission of smoke from an engine burning soft coal is confined to the time when the engine is going down grade?

A. Yes, going down grade it will give off smoke.

10

Q. And it doesn't give off smoke when it is going up-grade?

A. In that case the fire is worked upon very intense, and going down there is no draft on the fire at all; it is lying there dormant.

Q. The visible portions of the product which is thrown out by these engines burning soft coal is what?

A. We call it smoke; it is smoke, and we call it gas, this smoke.

Q. What is smoke?

A. Smoke is a colored carbonic acid gas, colored by the bituminous or tarry matter.

20

Q. Then the black smoke which is thrown out by the consumption of soft coal is composed of gases, carbonic acid gas, colored? A. Yes, sir.

Q. By bituminous tarry matter. A. Yes, sir, we call it tar.

Q. Then that smoke, if you call it smoke, is composed exclusively and entirely of a colored gas?

A. Yes, sir, colored gas.

Q. It carries nothing with it aside from the colored gas.

A. Of course, there will be some cinders and things like that, but it would be the same as we are breathing out now; carbonic acid gas, colored; same as the fog of London; it is not black but colored by the smoke of London.

30

Q. Upon what do you base your statement, Mr. Campbell, that all the governments of the country or of the world have been giving attention to the problem of avoiding smoke in the burning of soft coal?

A. Upon the proceedings that are published in the mechanical journals.

Q. You base that statement upon what you have read in the mechanical journals?

40

A. Yes, sir, and in the societies the discussion is taken up.

Q. You know nothing of your own personal knowledge except what you have read? A. Yes.

Q. And the statement you have made that none of the governments have been able to obviate the smoke is based upon the same information?

A. No, I beg pardon—that is based on personal observation—not only one observation here as I just cited, the case of the other day; but when the foreign fleet was leaving the North river a short time ago they did the same thing, and I have seen vessels in the English Channel, and German vessels, emitting black smoke.

10 Q. Do you know whether the officers in charge of those vessels, or the governments owning those vessels, had made any effort to obviate or eliminate that smoke?

A. We only know from reports, and that they had a forced draft to supply the air. I don't know that they used the forced draft; they use them in most of the cases.

Q. And that statement is also based upon what you have read in the various journals as to the extent to which the government had made an effort to obviate the smoke. A. Yes.

20 Q. The United States government vessel which you say you saw a few days ago, recently, you say it was giving off black smoke only because they were building up the fires?

A. There is always that, you know, when they are starting up service.

Q. Always? A. Always.

Q. Where were you? A. 64th street and West End avenue.

Q. And the vessel was going?

A. Out, I think it was the Delaware.

Q. Where did that vessel start from? A. 72nd Street.

Q. Do you know how long the fires had been built in that 80 vessel? A. I do not.

Q. But you made the statement that it was giving off smoke because they were building up the fires?

A. Building up the fires for service; we speak of the fires as building up for service, getting them ready for the work.

A. What knowledge had you as to what they were doing aboard that vessel with the fires at that time?

A. Nothing at all except the result as indicated by the top of the stack, the smoke.

Q. From the condition which you saw existing you drew the inference as to what the fireman were doing with the fires? 40

A. Yes, sir.

Q. You testified as to the bonfire; street fire; the bonfire such as you testified to is a wood fire, isn't it? A. Yes, sir.

Q. And not a coal fire? *A.* No.

Q. You wouldn't speak of a bonfire as a coal fire?

A. It is a wood fire, yes.

Q. And in these bonfires which you have seen being burned in the street, is there any difference in the color of the smoke as emitted from them from the color as emitted from the burning of soft coal?

A. Depends on the condition of the wood; if the wood is damp it will be a lightish color; if the wood is perfectly dry it will be not quite as black as bituminous coal, but it will be what we call 10 black smoke.

Q. And what is the substance composing this smoke which you see from the burning wood fire, bonfire—that carbonic acid gas?

A. Yes, sir, carbonic acid gas, colored.

Q. And that is all that is, nothing else?

A. Nothing else, no, sir.

Q. You say you made a rough estimate some years ago as to the increase of trackage and mileage which would be required by changing the fuel from soft coal to anthracite—about how many years ago did you make that investigation? 20

A. There was a preliminary examination made in '92 and '93 on the New York Central and Hudson River; I was connected with the road.

Q. You made that?

A. That was my duty; I was assistant superintendent of motive power; that was my duty.

Q. That was 1892? *A.* '92 or '93.

Q. That is nineteen years ago? *A.* Yes, sir.

Q. Have you made any estimate in that regard since then?

A. Six or seven years ago.

Q. About seven years ago? *A.* Yes, sir.

Q. 1904? *A.* About that, yes, sir.

Q. Where did you make that investigation?

A. On the Pennsylvania railroad.

Q. For whom?

A. For my own self; I was investigating another matter at that time; it was for my own sake.

Q. You make a personal investigation for your own sake?

A. No, by orders of the New York Central railroad.

Q. Well, that was in 1892? *A.* Yes.

Q. And the second investigation, that investigation was made while you were riding over the road?

A. That was for another purpose.

Q. Where were you going?

A. Between Jersey City and Philadelphia.

Q. And that estimate which you made at that time was confined to your investigation which you made on that one trip from New York to Philadelphia?

A. I spent two or three days on the road for another purpose; the question incidentally came in to me to see what the conditions were, not only the conditions for fuel, but if the Pennsylvania traffic increased how they were going to handle

10 it.

Q. This investigation commenced in 1904 and consisted of your observation on the two or three days' trip between here and Philadelphia? A. Yes, sir.

Q. May I, without being inquisitive, ask what other work you were doing at that time; you say you were on some other business?

A. I was a witness for the Pennsylvania railroad and it was a smoke question at that time; the Pennsylvania railroad asked me if I would get a man who was outside of any railroad work, 20 never worked on a railroad, a known engineer; they left the matter entirely in my hands; there was a man by the name of Mr. Rea, a mechanical engineer in New York—

Q. What was the nature of the work?

Mr. Wall—I object; I insist that the witness be allowed to proceed with his answer and not be interrupted and cut off by the question of counsel.

Q. Go on?

A. Mr. Rea and I had some doubts about this question; I went to the Pennsylvania Railroad Company and they gave 30 me a pass for Mr. Rea and I to ride on the road as long as we wanted to.

Q. Can you tell who gave you the pass?

A. Between Jersey City and Philadelphia; Mr. Abercrombie.

Q. What was the date of it? A. I couldn't say the date.

Q. Was it first class traveling?

Mr. Wall—I object to counsel seeking to make the witness ridiculous by making a silly interruption.

Q. Go on?

A. Mr. Rea and I rode on these locomotives, and all classes 40 of trains, and satisfied ourselves on the several questions we had any doubt on.

Mr. Hardenbrook—Defendant's counsel moves to strike out the answer as not responsive to the question.

Q. Have you finished your answer?

A. I don't know as there is anything more to say unless you want me to go into details.

Q. In the burning of anthracite coal you have stated that there is more carbonic acid gas thrown out than there is in the burning of bituminous coal?

A. I beg your pardon, I did not. 10

Q. What was your answer in connection with that?

A. There can be no more carbonic acid gas than what is in the fuel; 90 pounds of carbon will give out its equivalent 90¹/₂ pounds of carbonic oxide; there is no deviation, not an ounce, not an iota; the result of the combustion all depends on the weight of carbon.

Mr. Hardenbrook—I move to strike out the answer as not responsive to the question.

Q. Did you not state in answer to the counsel for the railroad company on your direct examination that more carbonic acid 20 gas was thrown out in the burning of anthracite coal than from an equal amount of bituminous coal? *A.* No, sir.

Q. Is there any difference so far as you know between the size of the engines operating and burning hard coal as operated by the Delaware, Lackawanna and Western, the New Jersey Central and the Lehigh Valley railroad and the Pennsylvania railroad?

A. They have all got a number of classes of engines.

Q. I said size? *A.* That must be size.

Q. They have different sized engines? 80

A. Yes, sir, different sizes.

Q. Is there any difference in the size of the ordinary passenger engine as used by the Pennsylvania railroad, and the ordinary sized engines as used by the Delaware, Lackawanna and Western?

A. For local service they are about the same; for through service the Lackawanna is not quite as heavy because their through trains are much lighter.

Q. What is the relative size of the ordinary freight engines of the Delaware, Lackawanna and Western and the New Jersey 40 Central and those used by the Pennsylvania Railroad?

A. For the different freight trains they run about the same,

the different classes in freight; probably not more than 5,000 pounds difference in weight.

RE-DIRECT EXAMINATION, by Mr. WALL:

Q. Mr. Campbell, why is it that the Delaware, Lackawanna and Western does its work with the engines burning hard coal, if what you say is true about the greater size of the fire box necessary for hard coal as against bituminous?

A. The Delaware, Lackawanna and Western Railroad has 10 not got the through service, the hard pulling service that the trunk lines have.

Q. Does it own its own coal mines? A. Beg pardon?

Q. Does it own its own coal mines?

A. Oh, yes; or at least it did own it until the intervention by the Interstate Commerce Commission.

Q. Was the same true of the Lehigh Valley and the Central Railroad of New Jersey? A. Yes, sir.

Q. Did you mean to testify that those three roads—

A. No, sir; I testified that the Buffalo end of the Delaware, 20 Lackawanna and Western, freight service, used soft coal; I don't know about that end of the Lehigh Valley, what they use; but on both roads they use anthracite coal in their passenger trains right through; the New Jersey Central is using soft coal on their freight out to Wilkesbarre.

Q. Are you advised as to whether the Lehigh Valley is using soft coal or hard coal exclusively in its passenger service?

A. No, sir; I am not; I know they are in the passenger service.

Q. Now, have you any idea about how many engines, about, 30 there are in this country, locomotive engines?

A. To-day there is now between 75,000 and 90,000 engines.

Q. Locomotives?

A. Yes. It is probably hard to get at the true account of it from this fact; there has been a cycle on the railroads about every ten years, and when the railroads have got new power they have laid up their old or tried to sell it or scrap it, but whether they carried those on their books I don't know, as equipment?

Q. It is 75,000 to 90,000, taking account of that?

A. I don't know; on the New Jersey Central we carried everything, for certain reasons; there are other railroads don't carry it; they put them off to one side and charge to Profit and Loss, so it is impossible to answer that question.

Q. Suppose there were 50,000 locomotives only, what would a fair estimate be of the tonnage of coal per day that they would burn?

A. Burned all the way through, about 24 tons; it will be ten tons every ten hours, laying up and all; all the locomotives are run double crewed; out of 24 hours they run 20 unless they are in the shop.

Q. Would the estimated supply of anthracite be sufficient to meet the needs of those locomotives for any length of time?

A. My idea, based on acquaintance with the anthracite coal people and section, is that it wouldn't for any length of time at all. **10**

RE-CROSS-EXAMINATION, by Mr. HARDENBROOK:

Q. What is the estimated amount of anthracite?

A. I told you I didn't know; we have all talked about that; the figures that I last got was between sixty and seventy years with the present consumption; others put it as high as a hundred years.

Q. The estimate which you have given, 75,000 to 90,000 locomotive engines, is based upon what? *A.* Reports of the railroads.

Mr. Wall—To the Interstate Commerce Commission. **20**

A. And I am talking it at our railroad clubs, and from mechanical engineers; there is no way of knowing really just what there is.

By Mr. HARDENBROOK:

Q. Upon what do you base that statement—those conversations?

A. From the reports of railroads; there are yearly and monthly reports. And the regular clubs I belong to; they also publish these things for our information; life is too short for a man to go around the country; he has got to take other people's word for it. **30**

Q. You have made no compilation of the total of all the engines of all the different roads? *A.* No, I have not.

Q. You have seen no compilation, have you?

A. Oh, yes, I have got two or three reports home now, giving the number of cars in the country, miles of track, etc.

Q. What is that?

A. The Railroad Gazette; the Railroad Club in New York. **40**

Q. How recently did you see that publication?

A. Some time in the past six months.

Q. You read that in the Railroad Gazette?

A. Yes; the Locomotive Engineer also gives the same infor-

Q. In the Railroad Gazette, which was published some few months ago, you read in that a statement of the compilation of the total number of locomotives in existence at the present time?

A. Approximate locomotives owned by the railroads; how many in service and number of cars.

Q. And that was between 75,000 to 90,000?

A. I didn't say just what that was; my own impression from all the reports is that is about it.

Q. What was the total compilation as appeared in the Rail-
10 road Gazette?

A. Some place between 75,000 and 90,000.

Q. That you read in the Railroad Gazette some few months ago? A. Some few months ago.

Q. How many months ago? A. Some time this year.

Q. In 1911? A. Yes, sir.

Q. Could you give the official title of that publication?

A. The New York Railroad Gazette.

Q. Published where? A. I don't know; New York.

Q. New York City? A. Yes, sir.

Q. What other publication did you read the total in?

A. The Railroad Engineers.

Q. When was that? A. Some time in the Spring.

Q. Spring of 1911? A. Yes, sir.

Q. That was in the Railroad Engineers, is that the full name of the magazine or publication? A. Yes, sir.

Q. That is published in New York City?

A. Yes, in Liberty Street, I think it is No. 114.

Q. In that publication you read the statement that there was from 75,000 to 90,000 estimated number of engines?

30 A. I say my impression, from the different statements; nobody knows that.

Q. I am trying to find out from you what publications you base this estimate on?

A. On these two; what they said I don't know, but it is very clear in my mind that there is some place between 75,000 and 90,000.

Q. And you base that statement upon what is contained in these two publications?

40 A. And general knowledge, and what railroad officials tell me. And I really think it is over 100,000 locomotives if it is carried down to a fine point.

Q. You mean all over the United States? A. Yes, sir.

Q. Have you any means or method of getting the number of locomotives on the various roads throughout the West?

A. Yes.

Q. How? A. By sending and getting the reports.

Q. How many of these reports have you sent and got?

A. I didn't require any.

Q. You didn't require any? A. No.

Q. But you said you based your estimate——

A. I beg your pardon; I said you could send and get them; I am going to amend my statement and stand by it, 100,000.

Q. Upon what do you base that statement?

A. Upon general knowledge.

10

Q. How do you obtain this general knowledge?

A. Railroad men, publications.

Q. How many railroad men have you conversed with as to the number of locomotive engines that they have on their roads?

A. I could not tell; I probably will meet to-morrow night thirty or forty men.

Q. Mention the names of some of them that you have conversed with in the last six months as to the number of locomotive engines that they have on their roads?

A. Chamberlain, of the New York Central; Park, of the Erie; and goodness only knows how many more.

Q. When did you converse with these gentlemen?

A. I think you are taxing me beyond reason; I am not a walking encyclopedia; you ask me that, I want you to stop it.

Q. When did you converse with these gentlemen?

A. From time to time; on the third Thursday of each month up to May, and quite often when they came to my office to visit me. At Port Jervis on the Erie, three weeks ago Sunday, with a mechanical engineer there talking about general matters, how many engines, and how many there were laying up.

30

Q. Who was the gentleman? A. James Parritt.

Q. And did he make a statement as to the number of engines which they had on the Erie railroad at that time?

A. In a general way.

Q. Describe what he said in a general way as to the number of engines which he had on the road at that time?

A. We talked in a general way about the number there was running, up to 1,800 to 2,000; how many were there and in the shop.

Q. Did he tell how many there were?

40

A. My impression which I gathered from him there was about 3,000 on this end.

Q. Did he tell you how many? A. No.

Q. Then you didn't base your estimate from anything he said to you as to the number of engines on the Erie railroad?

A. No.

Q. Did these two gentlemen that you met at the club on this Thursday, that you mentioned, did they tell you the number of engines they had on the road in operation?

A. Not at a particular time; I cannot tell you how that was, but I was talking with Chamberlain and Hogan, and we were talking about the number, and Mr. Chamberlain said "We are **10** away up now, up to 100,000, perhaps more."

Q. When did Mr. Chamberlain make that statement to you?

A. On the third Thursday of January, February, March, April or May of this year.

Q. What is his full name? A. Eugene.

Q. And who was the other gentleman that talked with you?

A. Mr. Hogan.

Q. What road is he connected with?

A. With the New York Central.

Q. You mentioned some other gentleman connected with **20** some other road, didn't you? A. No, sir.

Mr. Wall—Defendant objects to any further examination along this line on the ground that this is incompetent and improper cross-examination.

Q. The estimate of 75,000 to 90,000 locomotives which you testified was the estimated number then is based on the statements which you have given as to your sources of information in your testimony.

A. Yes, but I made it stronger than that; I made it over 100,000.

80 Further hearing of testimony in the above-entitled matter was adjourned to Wednesday, September 20th, 1911, at ten A. M.

United States Circuit Court, District of New Jersey.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Testimony taken in the above-entitled matter before Hon. 10
George R. Beach, Examiner, duly appointed by order of Judge
Joseph Cross; hearing at the office of Mr. Beach, 75 Mont-
gomery Street, Jersey City, New Jersey, on the 20th day of
September, nineteen hundred and eleven, at ten o'clock A. M.

Appearances—MR. FRANK M. HARDENBROOK, of counsel for
complainant; MR. ALBERT C. WALL, of counsel for defendant.

WILBUR P. GARABRANT, called as a witness by the defendant, being duly sworn, on oath testified as follows:

20

DIRECT EXAMINATION, by Mr. WALL:

Q. Mr. Garabrant, you are employed by the Pennsylvania Railroad Company? A. Yes, sir.

Q. In what capacity?

A. Road foreman of engines, New York division.

Q. How long have you been such?

A. About eighteen months.

Q. And before that?

A. I was assistant road foreman for two years.

Q. And before that?

80

A. General air brake and steam heat inspector.

Q. Previous to that? A. Locomotive engineer.

Q. Ever been a fireman?

A. Yes, sir, I was four years as fireman.

Q. How long as locomotive engineer?

A. Thirteen years as engineer.

Q. All on the New York division? A. Yes, sir.

Q. Of the Pennsylvania Railroad? A. Yes, sir.

Q. And your total service in the Railroad has been how long? A. Between 28 and 30 years.

40

Q. Mr. Garabrant, what are the duties of a road foreman of engines?

A. To assign all engines, assign all engineers and firemen to their respective duties, see that all our instructions are obeyed, and that all discipline is imposed, and it is the duty of the road foreman of engines to recommend that discipline.

Q. Are any instructions given to the firemen or engineers as to the method of firing engines?

A. We have printed instructions, in addition to which we have firemen instructors, to instruct verbally, also make practical demonstrations as regards the best methods of firing.

10 *Q.* Has any attention ever been given by the railroad in these printed instructions which you refer to to the question of the prevention of the emission of smoke from the engines?

A. Yes, sir; that is one of the important items that is covered.

Q. And how long ago to your knowledge did they begin to give instructions to the men to prevent the escape of smoke?

A. The first instructions were issued by the superintendent of motive power in about the year 1890, I think.

Q. You are now referring to the first printed instructions?

A. Yes, sir.

20 *Q.* Now then, in what form were they issued?

A. They were issued as a general notice and posted upon all bulletin boards; when I say that I mean engine houses, freight master's office, and everywhere that an engineer goes; it is the duty of an engineer to inspect that bulletin board before the starting of each day's work.

Q. Well then, the bulletin board is the regular method of getting orders to the engineer? *A.* Yes, sir.

Q. That is, orders that don't have to do with ordinary train management and so on?

30 *A.* Yes, and our general orders are placed there; the bulletin board is looked upon as the most important source of printed information.

Mr. Wall—Defendant offers in evidence printed instructions, dated July 23, 1890; July 24, 1902; June 1, 1908; March 17, 1910, the last two being designated Circular 81 and Circular 81A respectively, and asks that they be marked as Exhibits.

Marked respectively, Defendant's Exhibits 3, 4, 5, and 6, Sept. 20, 1911. J. H. C.

40 *Q.* Now, Mr. Garabrant, these different printed instructions which have just been put in evidence have all to your knowledge been issued by the railroad on or about the dates that were given?

A. Yes, sir.

Q. And they so far as you know present a complete list of the printed instructions that have been issued on the New York division in reference to the emission of smoke from July 23, 1890, to date, do they not? *A.* Yes, they do.

Q. Now some of the railroads, Mr. Garabrant, have a method of printed questions and printed answers, which they distribute to the firemen and engineers—does your company employ such a method? *A.* No, sir.

Q. Why not?

A. I might say that we Pennsylvania people have felt that more could be accomplished in the way of the prevention of smoke and economy of fuel, etc., by having instructors who would ride upon our engines, instruct the firemen the best method of firing and make a practical demonstration of how it should be done and can be done.

Q. Have you any such thing?

A. Yes, sir, we have had for a number of years.

Q. Well, what are these men you speak of—what is their title in the company's service?

A. Firemen instructors, selected of course from among whom we think are our best firemen.

Q. They are all practical men, are they?

A. Every one of them, yes, sir.

Q. They have come up from the realities and not down from the books? *A.* Yes, sir, entirely reality.

Q. How long to your knowledge have you had these firemen instructors?

A. We have had them about, possibly 23 years—22 years at least.

Q. And they actually show the men how to fire, that right? **80**

A. Yes, sir; that is their duty.

Q. What is the proper way to fire an engine?

A. In firing bituminous coal, to which I suppose you refer, the fireman to obtain the best results, both from an economical standpoint, and from the standpoint of the absence of smoke, he should fire what we term the one shovelful method. I mean by that that he should throw one shovelful of coal upon the fire, and place the door upon a latch as we term it.

Q. What does that mean?

A. The latch means that the door is not entirely closed; it is closed with the exception of possibly four inches; the reason for placing the door on a latch is to admit the free air passing

into the firebox; that mixing with the gases consumes the smoke and aids combustion.

Q. You spoke of the best method from an economical standpoint—what did you mean by that?

A. I mean that if we consume the smoke we burn considerably less fuel; a very great deal of the units of heat is contained in the gases that we make an effort to consume by the admission of air.

Q. What in your judgment is the most efficient way of preventing the undue escape of smoke?

A. I rather think, as I understand the question, that this is covered in my answer.

Q. I had reference to the various devices—there have been various devices, haven't there? A. Yes, sir.

Q. What has been your experience as to the most efficient method of minimizing the emission of smoke from locomotive engines?

A. A careful fireman is the best smoke consumer known to us to-day.

Q. These printed instructions which have been put in evidence, covering as they do a period from 1890 to date—is there any change in those instructions as to the method of firing, has any theory been promulgated in any of those things which has been subsequently thrown away? A. No, sir.

Q. And those instructions are the result of what?

A. A very careful study and observation of practical men—men who have been both firemen and engineers.

Q. Now, these firemen instructors go about among the firemen, and suppose the firemen, in spite of the instruction, as people often do in life, do not mind the instruction, what happens then. A. Then the fireman is careless.

Q. And if he is careless, what do you do?

A. Discipline the men; we of course have a regular procedure in taking their statements and making an investigation.

Q. How do you get word that the fireman has disregarded his instructions?

Q. I have five assistant road foremen; I have two travelling engineers; I have two firemen instructors; I have three men, whose duty it is, together with all the other men I have mentioned, to report all cases of smoke violation observed by them.

Q. Now, what do the travelling engineers do, what are their duties?

A. The travelling engineer's duty is to ride upon the engine,

see that the engine is working properly, is in good condition, that the engineer and firemen do their work in a proper manner, and call their attention to it if they don't, and if it is a case that should be reported, those cases are all reported to me.

Q. Now, you have not always had as large a force as that?

A. No, sir.

Q. Now, how long have you had these travelling engineers?

A. We have had the travelling engineers a number of years, but our men who are stationed at various points to observe smoke conditions we have not had very long.

10

By Mr. Hardenbrook—About how long?

A. About nine months.

By Mr. WALL:

Q. Those are men, however, who do nothing else, is that correct? *A.* Yes, sir.

Q. How many hours during the day do they work?

A. We have men on at night and in the daytime, about twelve hours each.

Q. Now, in the days before you had as big an organization and had as large a business as you have now, was it the duty of the assistant road foremen of engines or travelling firemen to report violations of these instructions? *A.* Yes, sir.

20

Q. In the proper methods of coaling? *A.* Yes, sir.

Q. Do you know whether these travelling firemen made it their duty to visit every engine on the division, or how did they manage that?

A. We get a report daily of each engine they have ridden on and the name of the engineer and fireman they ride with; the name of the fireman may be sometimes omitted; however, that information is easily accessible, and they cover the different territories of the division.

80

Q. Now, how about the discipline, suppose these reports come in, what does the railroad do then as to reports of carelessness of a fireman?

A. If the investigation develops the fact that in our judgment the case is one that warrants discipline, we discipline the men, depending upon their record. To make that clear, if a man has not previously been disciplined or reported for the emission of smoke, we generally reprimand that man as a fire offender.

40

Q. And if he has been disciplined, if it is not his first offense, what punishment do you impose then?

A. Generally a suspension of about two days; the third offense

it is sometimes as much as one week, but we have very few of any third offense.

Q. The men you are dealing with in attempting to impose that discipline are exclusively firemen and railroad enginemen?

A. Entirely so.

Q. And are they or are they not a good class of men?

A. Exceptionally good.

Q. Have you made any investigation to determine how many cases of actual discipline you have had during the past five years?

10 *A.* Yes, sir.

Q. How many men have you disciplined on the New York division during that period? *A.* In five years?

Q. Well, for any period that you have made any investigation?

A. In the year 1896, eighteen men were disciplined; in the year 1907, 34; in the year 1908, 15; in the year 1909, 15; in the year 1910, 53; this year, 1911, to date, 47.

Q. And have the penalties that have been visited in those cases been generally of the character that you have described as your practice in imposing penalties? *A.* Yes, sir.

20 No cross-examination.

WILLIAM MARSHALL, called as a witness by the defendant, being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. WALL.

Q. Mr. Marshall, what is your employment?

A. Locomotive engineer; special duty at present, pertaining to smoke; on the Pennsylvania Railroad.

Q. Were you ever a fireman instructor? *A.* Yes, sir.

Q. When?

30 *A.* 1907 to 1910, about three years.

Q. Did the territory in which you acted as fireman instructor include the Harsimus Cove Branch?

A. Yes, sir, up to the time it was changed to the Hudson Division; and last summer I was sent to the Harsimus Branch for about three weeks.

Q. When was the Harsimus Branch changed to the Hudson Division? *A.* I could not just say.

Q. About when?

A. About two years ago, January 1, 1909.

40 *Q.* And previous to that the Harsimus Cove Branch was in the New York Division, was it not? *A.* Yes, sir.

Q. Now, what did you instruct the firemen was the proper way to make a fire on a locomotive?

A. I insisted upon the one shovelful method and not sprinkling the coal.

Q. What is the trouble with sprinkling the coal?

A. That distils more gas than they can furnish air to consume, and smoke; by placing the coal it emitted very small amounts of smoke, never enough to be objectionable.

Q. Placing the coal is what?

A. Being careful to put it right on the spot you want it on; I also instructed the men when the engine was working slow and the exhaust was far apart as to allow the smoke to roll to 10 apply the blower full head.

Q. Did you have any cases of discipline? *A.* Yes, sir.

Q. Any that you reported yourself?

A. Yes, sir; what I considered being a little careless.

CROSS-EXAMINATION, by Mr. HARDENBROOK.

Q. How old are you. *A.* Twenty-seven.

GEORGE C. GARDNER, called as a witness by the defendant, being duly sworn according to law, testified as follows:

DIRECT EXAMINATION, by Mr. WALL: 20

Q. How old are you, Mr. Gardner? *A.* Thirty-eight.

Q. And your position is what in the Pennsylvania service?

A. General foreman motive power.

Q. You are connected with what division?

A. With the Hudson Division.

Q. And the Harsimus Cove Branch has since January, 1909, been under your control, has it?

A. Yes, but not exactly since that date; the Division was not fully organized; it was turned over at that time, but the motive power was still carried on the New York Division until February 30 of the same year.

Q. Now then, counsel suggests that in order to shorten the examination up I ask you the question as to whether you agree with the statements made by Mr. Garabrant in his testimony?

A. I do.

Q. And you don't recall anything he said which would be inapplicable in the Harsimus Branch?

A. No, I don't recall any objection.

CROSS-EXAMINATION, by Mr. HARDENBROOK: 40

Q. How long have you been general foreman of motive power? *A.* Since February 1st, 1909.

RE-DIRECT, by Mr. WALL:

Q. What was your employment before that?

A. I was General Foreman on the Belvidere division.

Q. How long have you been in Jersey City?

A. Since coming from the Belvidere Division.

Q. When did you come from there? A. February 1st, 1909.

MARTIN M. MINER, called as witness on behalf of defendant, being duly sworn according to law, testified as follows:

10 DIRECT EXAMINATION, by Mr. WALL:

Q. Mr. Miner, what is your employment with the Pennsylvania Railroad Company?

A. I am fireman instructor of the Hudson Division.

Q. And have been for how long?

A. For about fourteen months.

Q. And the Harsimus Branch falls within that territory?

A. Yes, sir.

Q. How do you instruct the men?

A. Well, I have used practically the same methods as set forth by Mr. Marshall in all my instructions—that is, placing each shovelful of coal where the fire most needs it at that time and not sprinkling the coal.

Q. And having an interval between shovelfuls?

A. Yes, sir, only one shovelful method, door on a latch at all times except on a very hard pull.

Q. Do you place those shovelfuls at any particular place on the bed of flame?

A. Yes, sir; class B 8 engines we have on the Hudson Division I have instructed the men to carry their fire light in the center of the fire box, and carry it in a semi-banked condition along the side sheets, and feed the coal at the sides and back corner; by doing this the draft on the fire will feed the center, and the coal being partially coked will emit a great deal less smoke, practically none if the fire is carefully handled.

Q. And the coal is coked, as you express it, by its presence in the fire box before it is actually used?

A. The gases are distilled from the coal at the sides of the box and pass over the hot fire in the center and the air mixing with the gases over the heat, burns it.

40 Q. Now in spite of your care and these methods employed, there are times when smoke will issue from the engine stack in considerable volume, will there not? A. Yes, sir.

Q. Is that avoidable? A. Well, practically no.

Q. What is the cause of it?

A. On a hard pull an engine will slip and tear the fire, and in event of such an occurrence you will have a few puffs of, dense smoke before the man can get his blower on to it. Then in the case of a new fire, where the fire is light, the heavy rush of air through the fire makes a much more rapid rate of combustion and distils the gases so fast we can't burn them and they will pass away in smoke where otherwise they would be burned up and pass away as a colorless gas.

Q. Let me see if I understand you—when an engine is called 10 upon to do extraordinary work, like taking a heavy train up an incline for instance, the exhaust from the engine is more violent? *A.* Yes, sir.

Q. And the increased draft caused thereby passes through the stack?

A. The draft is created by the exhaust steam passing through forming a vacuum in the fire box and the air pressure forced through the fire will tear the fire and cause a rapid rate of combustion; and in case of the engine slipping at such times it will tear the bed of the fire and make some black smoke in spite of 20 all precautions that a man can take.

CROSS-EXAMINATION, by Mr. HARDENBROOK:

Q. That condition would arise in climbing a heavy grade, would it not, more particularly than on the level?

A. Yes, sir; it would be more apt to happen in any case where an engine is called upon to exert extraordinary power, at short notice, where a man has not time to prepare himself.

Q. Those conditions would not occur on a down grade, would they? *A.* No, sir; not apt to.

30

Q. Would you mind stating your age?

A. Twenty-eight years and nine months.

WYCKOFF M. RUE, called as witness on behalf of the defendant, being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. WALL:

Q. Mr. Rue, you used to be a fireman instructor on the Pennsylvania Railroad? *A.* Yes, sir.

Q. How long ago? *A.* From July, 1899, to January, 1901. 40

Q. You have heard the testimony of these firemen instructors that has been given here this morning and also the testimony of Mr. Garabrant? *A.* I have.

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Q. What can you say as to the methods employed by you as fireman instructor when you were such and the methods employed by these gentlemen that they have testified to?

A. Just about the same; Mr. Garabrant, I think, covered everything, and the same conditions to-day; the instructions are practically the same to-day as at that time.

Q. What is your position with the company now?

A. Locomotive engineer, running an express train between Jersey City and Philadelphia.

10 No cross-examination.

MARTIN L. GARDNER, called as a witness on behalf of defendant, being duly sworn according to law on oath, testified as follows:

DIRECT EXAMINATION, by Mr. WALL:

Q. Mr. Gardner, what is your profession. *A.* Civil engineer.

Q. Employed by whom?

A. The Pennsylvania Railroad Company.

Q. For how long? *A.* Twenty-eight years.

20 *Q.* Do you know the Harsimus Cove Branch? *A.* Yes, sir.

Q. Do you know its location? *A.* Yes, sir.

Q. Its history? *A.* Yes, sir.

Mr. Wall—Defendant offers in evidence a blue print plan entitled P. R. R. N. J. Div. Hudson Div. Harsimus Branch, plan showing St. Anthony's church property, on which are shown in red the properties owned by the Pennsylvania Railroad on the branch in question, and in yellow the properties comprising the church and school and rectory, and on the upper right hand corner an elevation indicating the relative heights of the embankment on which the branch is laid, and the parochial school, with the width of Sixth Street in cross section.

30

Marked Defendant's Ex. 7, Sept. 20, 1911.

Q. I show you defendant's Ex. 7 and ask you if there have been any changes since the date of that blue print, August 8, 1910, with reference to the Branch?

A. There have been no changes; I made the plan.

Q. Is it correct? *A.* Yes, sir.

40 *Q.* In the scale? *A.* Yes, sir.

Q. The cross section is to a different scale naturally from the other parts of the plan, is it not?

A. Yes, the vertical scale is generally distorted.

Q. And what is the height of the embankment?

A. The height of the embankment is generally eighteen feet.

Q. What does that mean, general?

A. Generally above the level of Sixth Street opposite this particular property.

Q. And the vertical scale is one inch to twenty feet?

A. Yes, sir.

Q. And the horizontal scale is what?

A. One inch to one hundred feet.

Q. Now then the railroad at no point encroached on Sixth Street? *A.* No, sir.

Q. The embankment adjoins the line of Sixth Street, does it not?

A. The retaining walls of the embankment carried by the Harsimus Cove branch occupy the point in question, a strip of land 100 feet in width, the northerly line of the retaining wall being at the southerly line of Sixth Street.

Q. How long has the Harsimus Branch been in operation?

A. Since 1873.

Q. There have been placed in evidence in this case the Act to Enable the United Railroad Companies to improve their terminal facilities in Jersey City, found in the laws of 1868, page 551; can you say whether the grant therein mentioned in that law includes the Harsimus Branch which is the subject matter of this present suit? *A.* I can, and it does.

Q. Now, then, what does this Branch allude to?

A. The Harsimus Branch was originally built to connect our main passenger tracks with the Harsimus Cove terminal in Jersey City.

Q. Does it not now? *A.* Yes.

30

Q. Is that anywhere near the grain elevator?

A. The grain elevator is contained within the Harsimus Cove tract.

Q. And has the company more than one grain elevator on New York harbor? *A.* Only one.

Q. Does this branch connect with that elevator? *A.* Yes.

Q. Is the Harsimus terminal—do you call it that?

A. The terminal at Harsimus Cove is known as the Harsimus Cove terminal.

Q. Is that a freight terminal or passenger?

40

A. Entirely freight.

Q. Do these tracks that adjoin Sixth Street and pass the

church form the regular and only connection with the Harsimus terminal? *A.* Solely.

Q. What fuel has been used by the Pennsylvania Railroad in conducting its freight business since you have had any knowledge of the company and its methods?

A. Large bituminous coal; some anthracite.

CROSS-EXAMINATION, by Mr. HARDENBROOK:

10 *Q.* The connection between the tracks of the road and the Harsimus Cove terminal originally consisted of how many tracks? *A.* Two.

Q. And how long did it continue with two tracks?

Q. Up to the year 1887.

Q. In 1887 there were some additional tracks constructed?

A. There were, until we had the tracks that are there at the present time.

Q. In 1887 how many additional tracks were placed there?

A. We laid five tracks mainly.

Q. And then subsequent to that you laid more tracks. *A.* No.

20 *Q.* Those five additional tracks were laid in 1887?

A. Making seven in all as the maximum number of tracks that are on the Harsimus branch between Henderson street and the Jersey City cemetery to-day.

Q. And that section of tracks between Henderson street and the Cemetery pass immediately in front of the church property?

A. It passes as nearly to the southerly line of Sixth street as the retaining wall would permit the tracks.

30 *Q.* Since 1887 you say the company, Pennsylvania Railroad Company, has maintained seven tracks on the retaining wall between Monmouth and Grove Street?

A. I think I said seven; yes.

Q. When was this embankment on the retaining wall erected, do you remember what year?

A. I do; I had responsible charge of the building of that improvement; originally the road consisted of a double track timber trestle and under the necessities of business—not only that—but owing to the condition of the structure it was necessary to remove the timber structure.

Q. When was that done?

40 *A.* Between the years 1887 and 89; I have not the exact dates.

Q. On this stretch of tracks that appears by the Defendant's Ex. 7, there are a large number of switches, are there not?

A. There are at the west end of that sketch.

Q. The west end would be the end down toward Brunswick street?

A. Yes. That would be toward the west end; Brunswick is west of Monmouth; we describe our railroad as east and west.

Q. Isn't it a fact, Mr. Gardner, that there are various switches in the block between Monmouth Street and Brunswick?

A. It is a fact that there are various switches there.

Q. Have you any idea as to how many? *A.* About five.

Q. And in the block from Monmouth to Coles Street how many switches are there? *A.* None. 10

Q. You are confident of that from your own knowledge, or from the plan?

A. From the plan only; the plan was made from actual survey.

Q. The object of the plan was not particularly to show the switches?

A. It was to show the structures as they are to-day without any qualification.

Q. And you based your answer that there are no switches on the block between Monmouth and Coles Streets solely upon what appears on this plan? 20

A. From my survey; there may have been a switch built since the survey was made; I don't know it.

Q. Are there any of these gentlemen who have been witnesses here this morning who would be able to know the number of switches? *A.* I don't think so.

Q. Looking at that plan, Mr. Gardner, will you kindly indicate the points of the compass, North, South, East and West?

A. We generally term—

Q. Not that, give me the points on that plan?

A. Sixth street would be on the North side, Fifth street on the South side, Brunswick on the West side and Monmouth on the East side. 30

Q. According to the compass?

A. The general direction of the meridian.

Q. What is the top of the plan? *A.* North.

Q. The top of this plan? *A.* North.

Q. Have you any knowledge as to whether there are any switches between Coles street and the street immediately to the east? *A.* No.

Q. Have you no actual knowledge?

A. No knowledge from actual survey except that a switch may have been placed since that survey was made; in that event I do not know it but it will be reported the first of the year. 40

Q. That survey was made on the date appearing here, in August, 1910? *A.* Yes, sir.

Q. When were those switches which you have testified as existing between Monmouth and Brunswick streets, when were they put in?

A. Those switches were part of a well conceived plan—

Q. I do not care about that, when were they put in?

A. They were placed about 1889.

10 RE-DIRECT EXAMINATION, by Mr. WALL:

Q. Was the elevation that you meant as occurring sometime between 1887 and 1889 a general plan of elevating the tracks of the railroad company over Jersey City? A plan which was carried out with reference to all the tracks coming through Jersey City about that time? *A.* Yes.

WILLIAM H. ROBINSON, called as a witness on behalf of complainant, being duly sworn according to law, testified as follows:

DIRECT EXAMINATION, by Mr. HARDENBROOK:

20 *Q.* Where do you live, Mr. Robinson?

A. 12 West Hamilton Place, Jersey City, N. J.

Q. Were you ever employed by the Erie Railroad Company?

A. Yes, sir.

Q. In what capacity? *A.* Firing and engineer.

Q. In what years? *A.* I went firing in 1874.

Q. And continued how long? Until 1886.

Q. And during that time you burned what kind of fuel?

A. Soft coal, hard coal, coke.

Q. Different times? *A.* Yes, sir.

30 *Q.* For what period of time did you burn soft coal, about how many years? *A.* About eight or ten.

Q. On passenger or freight engines?

A. About six months on passenger, the rest of the time on freight.

Q. Were you ever an engineer on the Erie railroad?

A. From 1886 until 1907, December, 1907.

Q. That makes a period of about how many years in the employ of the Erie Railroad Company as engineer and fireman?

A. Thirty-three or thirty-four, fireman and engineer.

40 *Q.* During the time that you were in the employ of the Erie railroad were you assigned to any other duties than fireman and engineer? *A.* Yes, sir.

Q. What?

A. Well, they have what they call learning people how to fire soft coal.

Q. What was the designation of your position, what did they call that position?

A. It wasn't called anything than what is called—any more than what is called fireman inspector like.

Q. And your duties as such called you where?

A. From Jersey City to Port Jervis.

Q. And for how long a period of time did you occupy that position with the Erie Railroad? *A.* About three months.

Q. And during that time—you say you were employed for how long, about how long were you engaged in that work?

A. Three months.

Q. And did you instruct firemen every day as to what you regarded the proper method of firing engines?

A. Yes, sir, every day.

Q. About how many a day?

A. Maybe some days four or five; maybe eight or ten, according to what kind of a man I was instructing.

Q. What do you consider the proper method of firing an engine to prevent the emission of black smoke? 20

A. Well, throw one shovelful in at a time, and have your door on a latch, what we call a latch, this is about one inch open.

Q. And that would eliminate the emission of black smoke?

A. Yes, sir.

Q. To what extent? *A.* About ninety per cent.

Q. What do you regard as the improper method of firing an engine?

A. Throwing three or four, or four of five shovelfuls in, slam up the door and your smoke will go out the stack. 30

Q. Your experience with the firemen generally was that they followed the method in which you instructed them, or the last method which you have designated as an improper way of firing?

Mr. Wall—Objected to by defendant as irrelevant; this was on the Erie railroad.

Question withdrawn.

Q. Did you find it an easy or a difficult matter to instruct these men how to properly fire an engine?

Mr. Wall—Objected to by defendant, as the element of human nature is not the subject of inquiry in this suit. 40

A. Very easy.

Q. From your experience and observation is there any differ-

ence in the amount of smoke which is emitted from the burning of soft coal in a locomotive engine in travelling up grade or down grade?

A. There ought not to be a bit when the engine is fired properly.

Q. Under what conditions should there not be a bit, when?

A. On a down grade.

CROSS-EXAMINATION, by Mr. WALL:

10 *Q.* Aren't you wrong about saying that you did not have any title when you did that, when you gave these instructions you have testified to?

A. It was merely this, it was a title instructing firemen, fireman instructor; that was about all there was to it. It was on account of Paterson and Middleton kicking because there was smoke on coming into the depot.

Q. What are you doing now? *A.* I am not doing anything.

Q. Where do you live?

A. 12 West Hamilton Place, Jersey City.

30 *Q.* And how long is it since you have done anything?

A. I work as engineer; I was working a few days the other day.

Q. How long ago was that? *A.* Day before yesterday.

Q. Then you are doing something now?

A. Once in a while; anything I get to do I do.

Q. What is your business?

A. My business is still engineer; stationary engineer; got a license.

Q. How long since you have been a locomotive engineer?

30 *A.* Since 1907.

Q. And where have you been a stationary engineer since then?

A. With the people that built the subway from the Erie up to Kelso street.

Q. With the Melord?

A. With the Phoenix Construction Company.

Q. Then you were not with the Melord?

A. No; Phoenix; yes, sir; Melord are the Philadelphia people—I run an engine for them for four weeks, one of those dinkeys.

40 *Q.* Now your experience when you were acting as a fireman instructor, your experience was like the experience of any other man, a good man would do as you said, that right?

A. Yes, sir.

Q. And a man that wasn't so careful wouldn't do all that you said, he would show a little carelessness? *A.* Surely.

Q. In other words, this question of teaching a man to fire properly seems to be a question of human nature?

A. If he had to fire while I was there he might fire right and when I went away he might do as he pleased.

Q. And when you said that there should not be any difference in the emission of smoke from an engine going up grade and down grade, did you mean to say that there is not a greater demand on a locomotive going up grade? 10.

A. Surely it will work harder.

Q. And when they work harder? *A.* They use more coal.

Q. And it may be that the necessities of the work and the tremendous demand put on an engine may be such, that the coal has to be put on a little bit oftener to do the work, isn't that true? A little bit faster, to do the work?

A. Not if you don't put too much of it in.

Q. Isn't there a necessity for more frequent firing if a greater burden is put upon a locomotive to perform?

A. Surely. 20.

Q. And doesn't the necessity of more frequent firing bring with it the necessity of producing more smoke?

A. Not a great deal—not if it is fired properly.

Q. Some more?

A. A little bit; not a great deal if fired properly.

Q. What you mean to say is that if you had nothing to look to but the emission of smoke you could under most conditions so fire an engine so there would be very little smoke? But if you had to get through with your work and haul a great big train and fire up grade and the exhaust was tearing your fire, then it would be an exceedingly difficult thing to maintain your pull up the grade and at the same time keep your fire in such condition that it didn't emit considerable smoke, wouldn't it? 30

A. I am talking about through this city.

Q. I am not asking you that, won't you answer my question?

A. Yes, sir; certainly it would emit some smoke, some tearing up the fire would emit some smoke, but there is no necessity of firing any coal from the time you leave that depot until you get a mile out of the city, with soft coal.

Mr. Wall—I ask that that answer be stricken out 40
as unresponsive to my question.

Q. As I understood your testimony the result of your experience in proper firing has been that it agrees absolutely with

the experience that these men here have testified to this morning, in your hearing?

A. I was not here, I didn't hear them.

Q. The one shovelful method that you testified to is in your judgment the most efficient way of producing the undue emission of smoke from soft coal?

A. Yes, sir, and by leaving the door on the latch.

Q. And leaving the door on the latch? *A.* Yes, sir.

Q. So that the fire will be properly aired? *A.* Yes, sir.

10

RE-DIRECT, by Mr. HARDENBROOK:

Q. In answer to one of the questions asked you by the counsel for the defense you said something about there being no necessity for the emission of smoke from a locomotive engine while traveling through Jersey City? Describe what you mean by that?

Mr. Wall—Objected to by defendant on the ground that it was an irresponsible answer to which objection was made at the time, and is not proper re-direct.

20

Q. Answer the question?

A. You can fix your fire at the depot here—it is a great deal better than the Erie is, with no grade.

Q. What do you mean, what is better?

A. The Pennsylvania is better; you can get out, and while you might lose ten or fifteen pounds of steam before you get to the Meadows, you don't have to put in any coal, and there is lots of chance there to get it back again.

Q. And the Meadows is some distance beyond the depot?

A. I guess it is a mile and a half.

30

RE-CROSS EXAMINATION, by Mr. WALL:

Q. What is the grade of the Harsimus branch?

A. I was never on it.

Q. The grade that you are talking about is the grade of the passenger track?

A. Of the Pennsylvania Railroad; I don't think there is any grade on it.

Q. Of the passenger track?

A. I don't think there is am much grade as on the Erie railroad.

40

Q. Did you know that this suit was concerned with the Harsimus branch?

A. I don't know anything about it; don't know what suit it is.

Q. And you don't know anything about the grade of the Harsimus branch? *A.* I don't.

Q. Then if you should learn that the grade on the Harsimus branch was considerably greater than it was on the passenger tracks, then you would vary your answer?

A. Not much difference.

Q. Tell us why?

A. Why? Because I say that if you fire properly, fire an engine properly and do as I say, certainly there would be smoke oftener but not a great deal of it.

10

Q. If there was a grade of course there would be more smoke?

A. Not without the grade was too high; certainly there would be some smoke; you would have to put it in a little oftener.

Q. What do you say is a grade that will make smoke?

A. About seventy-five.

Q. Seventy-five what? *A.* Seventy-five to one hundred feet.

Q. Seventy-five feet what? *A.* Seventy-five feet to a mile.

Q. What per cent. of grade is that?

A. I suppose 75; I don't know what per cent. it is; I am not scholar enough for that.

20

Q. And that in your judgment would necessitate the conditions that would make more smoke than a level would?

A. Yes, sir; not a great deal more.

Q. You have had experience in hauling heavy freight?

A. Yes, sir.

MARTIN L. GARDNER, recalled by defendant, testified as follows:

DIRECT EXAMINATION, by Mr. WALL:

Q. What is the grade of the Harsimus branch?

30

A. The grade of the Harsimus Cove branch generally is a descending grade eastward to the grain elevator at Harsimus Cove; it is generally the 6/10 of one per cent. grade.

Q. Do you know what the grade is opposite this plaintiff in the action, this church?

A. About 6/10 of one per cent.

Q. Is the grade in any way necessitated by the fact that the traffic has to get from the river level up to the elevation?

A. No, the grade is made necessary by reason of the general elevation of the streets over which the Harsimus branch must cross.

40

CROSS-EXAMINATION, by Mr. HARDENBROOK:

Q. 6/10 of one per cent. grade would be how many feet in a mile?

A. Thirty feet; 75 feet to a mile is very heavy.

Taking of further testimony in the above-entitled matter adjourned to September 26th, 1911, at two o'clock P. M.

By agreement of counsel the matter was still further adjourned to Monday, October 2, 1911, at two P. M.

10

United States District Court, District of New Jersey.

ROMAN CATHOLIC CHURCH OF ST.

ANTHONY OF PADUA,

Complainant,

vs.

THE PENNSYLVANIA RAILROAD

COMPANY,

Defendant.

20

Testimony taken in the above entitled matter before Hon. George R. Beach, Examiner, duly appointed by order of Judge Joseph Cross; hearing at the office of Mr. Beach, 75 Montgomery street, Jersey City, N. J., on the 2d day of October, nineteen hundred and eleven, at two o'clock P. M.

Appearances—Mr. FRANK M. HARDENBROOK, of counsel for complainant; Mr. ALBERT C. WALL, of counsel for defendant.

30 ALFRED W. GIBBS, called as a witness on behalf of defendant, being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. WALL:

Q. What is your connection with the Pennsylvania Railroad, Mr. Gibbs? *A.* Chief mechanical engineer.

Q. Stationed where? *A.* Philadelphia.

Q. And prior to that you were what?

A. I was superintendent of motive power; before that I was superintendent of motive power on the Philadelphia, Baltimore and Wil.; before that I had charge of the test department; I had charge of the department of tests.

40

Q. How many years have you been in the Pennsylvania?

A. Twenty years.

Q. Twenty years what? *A.* With the Pennsylvania Railroad.

Q. And still with them? *A.* Yes, sir.

Q. And as general superintendent of motive power and as chief mechanical engineer, does the question of the consumption of fuel and the methods of consumption and the minimizing of the emission of smoke come under your supervision?

A. It does; for the whole time that I was general superintendent of motive power I had to do with the supply of coal 10 to the company, and with the tests of the coal to determine the qualities; the department of tests is one of the branches of that office.

Q. Now Mr. Gibbs, I have here a pamphlet entitled "The Problem of Reducing Smoke on Railroads," a paper prepared by Alfred W. Gibbs, general superintendent of motive power, Pennsylvania Railroad Company, at the request of the American Civic Federation, November 17, 1908, did you prepare that report?

A. I did, entirely; that was through no desire of mine, but there was simply forwarded to me this request of the Civic Federation and I was requested to prepare a paper describing the situation as it was, and that paper was read at a meeting in Pittsburgh in 1909. 20

By Mr. Hardenbrook—*Q.* The paper now in the hands of counsel? *A.* Yes. *Q.* You prepared the paper? *A.* I did; there are two papers now in the hands of counsel; I prepared the first one.

By Mr. WALL:

Q. Why are the railroads in general, and the Pennsylvania Railroad, interested in the question of smoke prevention? 20

A. It is unquestionably very objectionable; it is wasteful and it is an annoyance not only to the citizens, but it is an annoyance to the railroad, the men themselves, and for that reason we do what we can to prevent it; we have to use the fuel that is available.

Q. Does the nature of the locomotive fire enter as a governing factor in your discussion of the problem?

Mr. Hardenbrook—Objected to by complainant as incompetent, irrelevant and immaterial. 20

A. It does, for the reason that the locomotive fire is probably the most concentrated of any fire that we have knowledge of; we must burn in an exceedingly limited space a very large amount of fuel; we cannot increase that amount of space be-

cause of the size of the locomotive, the distance between tracks, etc., so we can only have a fire box of a certain size; we cannot have it much longer because the man cannot fire the coal in, and as a final result we probably burn more coal on a given surface in a locomotive than anywhere else—the possible exception is the steam fire engine.

Q. And what can you say as to the advantage of any comparison between the railroads in this country and the railroads on the continent, and in Europe?

10 Mr. Hardenbrook—Objected to by complainant as incompetent, irrelevant and immaterial.

A. As a rule our custom is to load our locomotives to the fullest capacity with the idea of running the largest trains that we can handle; we are forced to do that in order to make a living.

Mr. Hardenbrook—Motion to strike out the answer as entirely irresponsible to the question.

Q. Does the fact that the European roads use more frequent and lighter units affect the problem?

20 Mr. Hardenbrook—Objected to by complainant as incompetent, irrelevant and immaterial.

A. It does for this reason; a man can fire a small locomotive much more skillfully than a large one, for the reason that the physical demand on the man is very much less; every increase in the size of the locomotive, the amount of fuel handled increases, and the man consequently does not fire them with the same skill as if he had less coal to fire. The European locomotives, including the English, are as a rule very much smaller than our own.

30 *Q.* What can you say as to the intensity with which the boiler is operated in comparison with other power plants?

Mr. Hardenbrook—Objected to by complainant as incompetent, irrelevant and immaterial.

A. In stationary practice they burn from 25 to 30 pounds per square foot of grate every hour, that is about full capacity; in locomotives it goes as high as 100 and even 125 pounds. In locomotives we burn from 100 to 125 pounds of coal on one square foot of grate every hour; not all locomotives, but we work up to that capacity.

40 *Q.* Is there any reason why the conditions as to the emission of smoke should be more difficult to handle at terminals than out on the road?

A. They are much more, for the reason that at terminals the

old fires which are brought in have to be cleaned and stirred up, sometimes taken out and new fires built; during the time of building these new fires there is very little draft; the coal is fresh, what we call a green fire and always gives off a quantity of smoke; the best conditions are not arrived at until the locomotive has been running a sufficient time to get the fire into a thoroughly incandescent condition; just at the time we most object to smoke we have the condition that makes it.

Q. Briefly, what has the Pennsylvania Railroad done since you have been connected with it to minimize the emission of 10 smoke from its locomotives?

A. Mr. Hardenbrook—Objected to by complainant as irrelevant, incompetent and immaterial.

A. My knowledge goes back nearly thirty-five years. The company has been, not all the time, but practically so, experimenting with different devices and different fuels; they have tried nearly everything that has been presented—coke, anthracite coal, different kinds of bituminous coal and oil; the results with coke have always been unsatisfactory; they made a great many of them years ago; not so many late years, but those trials 20 were very frequent thirty years ago until they established the fact that our locomotives would not do the work with coke, and since the tests have been spasmodic; with anthracite coal, we have used that in large quantities in short runs; we do that in the summer time, use a considerable amount of anthracite coal because that is the time when the people have the windows open.

Q. On passenger trains or freight?

A. On passenger, never on freight.

Q. Why not?

A. Because we have never succeeded in making it do; during one of the bituminous coal strikes we have had to use anthracite on freight engines with unsatisfactory results. 30

Q. Why?

A. Because the fire clinkers, black spots in the fire. You must bear in mind this; our locomotives are designed to burn bituminous coal; they are not designed to burn anthracite coal; they would be designed in an entirely different manner if anthracite was our fuel; we are not in the anthracite region, except to a very small extent, so they are designed to burn the fuel that we find in our territory.

Q. What is the comparative value for doing the work of the railroad between anthracite and bituminous coal? 40

A. As a general rule anthracite is a sluggish fuel; it requires

a great deal more grate, larger grate to burn anthracite; I don't know any place where anthracite is used over great distances; bituminous can be run an indefinite distance without any stopping only to empty the ashes out of the pan.

Q. Is the smaller grate necessary to burn bituminous coal efficiently another way of saying that bituminous is a superior fuel to anthracite? *A.* I think so.

Q. Have you ever given any attention to the study of the amount of anthracite available in this country?

10 *A.* I had a tabulation made about three years ago or four years ago taken from official reports of the production of anthracite and bituminous coal, and I found that it ran in round figures about 70,000,000 tons of anthracite, and about 400,000,000 tons of bituminous coal, and of that bituminous coal about 36,000,000 tons was made into coke.

Q. Those figures are annually?

A. Those were the figures of the year 1907, I think. It fluctuates some, yet as a general rule bituminous production is increasing.

20 *Q.* Have you any knowledge, Mr. Gibbs, of the amount of bituminous that was used in this country during say 1907, was it 400,000,000 tons? *A.* In round figures about that.

Q. And that of anthracite was how much?

A. Seventy million tons; those are approximate figures.

Q. What in your judgment are the best methods of eliminating the emission of smoke?

30 *A.* First, everlasting supervision. Second, in the way of appliances, the use of brick arches which are merely arches of refractory material which are built over the fire, with the idea of preventing the immediate access of the gases and combustion to the tubes, with the idea of giving the longest time and longest space in which to complete the combustion. Third, there are various methods of admitting air over the fire, sometimes through the side of the box, sometimes through the door; there are various arrangements of steam jets by which the air is forced into the box through the pipes; sometimes forced through in a tube, sometimes forced through above the fire in a tube. Finally, there are the automatic stokers, in which the coal is put into the box automatically, thus relieving the man of the hard part of the work, leaving the man to do the more skillful part of the work.

Q. Do I understand you to say there were 400,000,000 tons mined? *A.* Production.

Q. Did you give the use of bituminous in that year?

A. I think it was about 100,000,000 tons used in the railroads; 36,000,000 tons used for making coke, and the rest of it for other purposes. I remember that the consumption of coal by locomotives was very much more than the amount of anthracite that was mined.

Q. As between devices and a system of unrelenting supervision what do you declare for as the best means of prevention?

A. The supervision.

Q. Has the railroad conducted any tests in the direction of the prevention of smoke emission since you have been connected with it? 10

Mr. Hardenbrook—Objected to by complainant as irrelevant, incompetent and immaterial.

A. The company has an establishment at Altoona, especially devoted to the testing of locomotives; this is a system in which locomotives are tested while running; they are so arranged that we can determine the power they are developing, and we develop the amount of smoke which is emitted at very short intervals; there is a recognized schedule of smoke established by a German engineer called the Ringelmann method; this consists of a large chart or set of charts, five in number, one being white, one being black, and the three intermediate grades being shown by black lines drawn at right angles; these lines are the same distance apart; in number one the line is very small, consequently the obscuration is small; in number 2 the lines are wider and the chart looks very decidedly darker; numbers three and four are progressive; now this is generally recognized by engineers. In other words, there are really six, 0, 1, 2, 3, 4 and 5. 0 is perfectly clear. This chart is commonly accepted and is easily accessible. I can furnish one, but it is not necessary because it is a matter of record; you get the report of smoke by the Ringelmann method. 20

Q. Now you were going on to explain the method of tests when you got to this.

A. The object of this plan is to test locomotives and to test coals. We get coals from about one hundred different sources and it differs considerably in value, and we thought that by putting up a plant like that, and testing the coals in the locomotives we could determine the value of the coals and how much money we could pay for them; incidentally the object of each test is a record of the smoke produced; as a general rule the more 40

severely the locomotive is worked the more dense the smoke is; when an engine is lightly worked smoke may be almost absent. I may say that observations are taken of smoke column with these charts placed alongside; the charts are in front and the column of smoke placed behind; and the man picks out which grade of smoke, or which chart corresponds with the color of the smoke immediately behind, and then he records that as number so and so smoke, and he takes that observation every so often, maybe ten seconds, maybe fifteen seconds, or maybe a longer period, but at regular periods.

10 Q. Are these locomotives upon which the tests are made in a building?

A. Yes, for convenience, because there is very important apparatus connected with it.

Q. And the locomotive is fixed?

A. It can't get away.

Q. It runs at full speed if necessary. A. Any speed you choose.

20 Q. And there are railways or wheels attached to the wheels to take up the motion?

A. It runs on supporting wheels, and then we put a load on the engine by resisting the motion of those wheels; that plant has been running since 1905 with a short intermission; I think we have up to date tested 95 to 100 different kinds of coal.

Q. And what has been the experience of the company in trying to supplant the use of bituminous at periods when strikes interfered with the supply of bituminous.

Mr. Hardenbrook—Objected to by complainant as incompetent, irrelevant and immaterial

20 A. Practically there are only two fields available, bituminous and anthracite; when it is impossible to get bituminous it is impossible to get coke, because the coke is made out of the bituminous coal. As I say, we have never been successful in our performance with anthracite for the reason that I gave you, that our locomotives are designed to burn the coal we have.

Q. Has the company done anything since you have been connected with it in sending out men to other parts of the world to study the methods employed by other railroads?

Mr. Hardenbrook—Objected to by complainant as

40 irrelevant, incompetent and immaterial.

A. Whenever we hear that some other part of the world is doing this or that successfully we try to find out what they are doing. We have sent men over a wide territory in this

country and about two years ago we sent a committee to England and the Continent, by that I mean Germany and France—a committee of expert men to see just what they were doing and to see whether it was true that in the terminals they were able to avoid smoke. That committee consisted of three men; they had credentials to the railroad officials and to the German government and were given every opportunity of seeing how their locomotives were handled on the road and in the terminals.

Their report was not as encouraging as we hoped it would be. They reported generally on the use of the brick arches, and on a device introduced in Germany which they thought was good, so that we sent over to Germany and got one, and we had it put on our locomotives under the auspices of the engineer of the patentee, and we have been trying that, but that is really only one of so many trials that I cannot remember them. We have tried the different coals that were available and we have coal made up into brickuettes. 10

Q. What has been the history in the main of the trial of those devices?

Mr. Hardenbrook—Objected to by complainant as 20 incompetent, irrelevant and immaterial.

A. Some of them are good, are helpful; the arch is one of the best with which we are familiar. The arch is a slab, what you might call an inclined floor, of refractory brick which is placed over the grate; it is close to the front of the box and is open at the back so that the fire can come up and whirl around it and then go forward. On the small engines used abroad these are very much like the arches of a bridge; in this country, with a very much wider box we do not use the arch in that form, but support this refractory material on the water pipes; the water pipes are kept cool by the circulation of water and the bricks rest on them. They are not without objection, and every now and then these pipes burst. They were used some thirty years ago and were given up for two reasons—a good many men had been scalded, and they interfered with the proper inspection; they get in an incandescent temperature and remain hot for some time. While they were used thirty years ago they were almost entirely stopped until a few years ago again we began using them in the hope of improving this situation. 30

Q. Is it the same type of arch as formerly used?

A. No, it is put up in sections now so that we can get at it for inspection. There is still one other device—that is the automatic stoker. There is one being introduced by us, and we have 40

got some running, where the coal is shoved under the fire, and can be used with the idea that the top of it shall be hot all the time, shall be bright; that seems to offer some promise, considerable promise of diminution of smoke.

CROSS-EXAMINATION, by Mr. HARDENBROOK:

Q. What advantage has the automatic stoker just referred to over the fireman?

A. It has the very great advantage that it does not get tired; 10 that it can handle more coal than a man can handle, and therefore the man is relieved of the laborious part of the work.

Q. That is the only advantage which the automatic stoker has over the fireman?

A. Not all; some of the stokers relieve the man of the work but they make more smoke than the man does. One stoker which is very successful in the way of keeping up steam makes more smoke than a man can possibly make; that is not successful I should say from a general standpoint. There is one which pushes the fresh coal under the burning coal, and while it is not 20 entirely beyond the experimental stage it is very promising on account of the very small amount of smoke that is made. Most stokers use more coal than a man does; they are not economical so far.

Q. And the stokers that use more coal than is economical is due to the fact that they shovel in more coal into the fire box to do the work required to be done by the engine, professor?

A. I am not a professor, sir; I am an ordinary railroad-man; I cannot fully explain why that is; all I know is that no mechanical device seems to be as economical as a thoroughly trained 30 man; that is pretty well recognized, but there is this difference, that a man gets tired after one or two or three hours' work, and the machine does not get tired.

Q. Then if you should relieve the man after three hours' work by a fresh man, that difficulty would be overcome?

A. Maybe two hours in some places.

Q. Well if a fresh man was put on that difficulty would be overcome?

A. If we could relieve our men or put another man on every two hours I believe that it would beat the stoker.

40 Q. What is being done by the Pennsylvania Railroad Company so far as you know of your own personal knowledge at the present time to prevent entirely or to alleviate to a substantial extent the emission of black smoke from the engines of the railroad?

A. By having a large force of men whose duty is to supervise and instruct; also by issuing detailed instructions in printed form telling the men how we want the locomotives fired.

Q. And are those men which are detailed for the purpose of instructing the firemen as to how locomotives should be fired competent?

A. They are designed for that purpose.

Q. Competent to instruct those men as to how those engines should be fired so as to eliminate the emission of black smoke in the operation of an engine? 10

A. I can only answer that by saying that they are chosen because they are considered competent. We have some of the most skilful men that can be found anywhere. You cannot get all men as good as the best. There is a difference, but those men who are instructors are chosen because they are better than the average, or believed to be.

Q. And are those men who are called upon to instruct those firemen as to how to fire an engine and prevent the emission of smoke qualified themselves to so fire an engine as to prevent the emission of smoke in the operation of an engine? 20

A. I think so, sir. I cannot speak for every man because I don't know them. There are men that I do know are skilful—so skilful some of them that we have sent them to other roads.

Q. These various devices which you have testified to as having been experimented with, if I may use the expression, in Germany, were not under your personal supervision, were they?

A. No.

Q. You know nothing of these experiments which were conducted in Germany except what you have read from various magazines or articles on that subject in the various publications? 30

A. Certainly; I have been over there; I have ridden on those German locomotives.

Q. I am asking you as to whether the experiments with these general devices to which you have testified as being conducted in Germany were under your supervision or under your observation, or whether you have any knowledge as to them except what you have derived from reading various articles in publications? A. That is right.

Q. And your testimony as to what has been done in that regard is entirely hearsay? 40

A. My testimony has been based on our own practice. The questions which have been asked me have been concerning the Pennsylvania Railroad practice.

Q. You testified in answer to counsel for defendant on your direct examination, as to various experiments which had been made in Germany—my question was whether or not your knowledge of what experiments had been made in Germany in connection with these various question of the emission of smoke was based upon your own knowledge, or based upon knowledge which you have derived from reading various publications on that subject?

A. I can only answer that by saying that I had read of these 10 experiments and I sent a committee over there to investigate and report.

Q. And the committee reported to you? A. Yes, sir.

Q. Then your entire testimony as to these experiments in Germany is based on what you have read in various articles purporting to contain what those experiments were, and the reports which were made to you by the committee which you or your company had sent over to Germany for the purpose of making investigation?

A. My information was derived from reading available literature; secondly, from reading and from questioning the committee that I sent over to find out these things.

Q. And from those two sources you based the testimony which you have heretofore given as to the experiments in Germany?

A. In Germany, yes; the main part of the testimony was concerning our own practice; that is not hearsay at all; that is my own personal knowledge.

Q. I am speaking now of Germany—that is this country.

Mr. Hardenbrook—Counsel for complainant moves 30 to strike out all of the testimony of the witness as to the experiments which have been made in Germany to which he has testified in his direct examination, and in reference to all charts incidental thereto, on the ground that it is based wholly and exclusively upon hearsay testimony and not within any personal knowledge of the witness.

Q. I believe you testified, Mr. Gibbs, that you sent men to all parts of the world? A. Yes, sir.

Q. To find out and ascertain how a locomotive engine could be operated so as to avoid the emission of black smoke?

A. Not exactly; I said Germany, England and France.

Q. You sent men to Germany, England and France?

A. Yes, sir.

Q. Then when you said you sent men all over the world, on your direct examination, you wish to confine that testimony to the statement that you sent men only to France, Germany and England. A. I think I qualified it at that time.

Q. For the purpose of finding out how a locomotive engine could be operated without emitting smoke?

A. Particularly with reference to the terminals; I may add that what we were most anxious to learn was how we could handle the locomotive in the big cities without smoke. The first intention was to send them to London, and afterwards the trip 10 was amplified to include Germany and France.

Q. And when you say terminals in the big cities, do you wish to restrict or confine that to the immediate terminal, or for the section of the tracks which may run for a mile or two miles more or less from the terminal through the city before it reaches the suburbs?

A. I meant in the city, from the time they went in until they went out.

Q. Not confining it specially to the terminal itself? A. No, sir.

Q. It was through the section of the city after they left the terminal until the train passed outside of the city? A. Yes, sir. 20

Q. And did these gentlemen find out or ascertain or report to you or your company, so far as you have any knowledge any manner by which a locomotive engine could be taken from the terminal out through the city, to the suburbs, without the emission of smoke? A. No, sir.

Q. They didn't report it possible?

A. They didn't find it.

Q. You are familiar with the railroad corporation known as the Delaware, Lackawanna and Western Railroad Company? 30

A. I am.

Q. Which has its terminal in Hoboken? A. Yes, sir.

Q. County of Hudson and State of New Jersey? A. Yes, sir.

Q. How far distant is that terminal from the terminal of the Pennsylvania Railroad Company, with which you are connected?

A. I should say about two miles and a half.

Q. In your desire to ascertain whether it was possible to fire a locomotive engine at its terminal and take it out through the city to the suburbs without the emission of smoke, did the idea occur to you or your company that they could find a railroad company operating within two and a half miles of your terminal here that were doing that thing without the necessity of sending over to Europe for that purpose? 40

A. I knew that perfectly well.

Q. The Delaware, Lackawanna and Western which has its terminal two and a half miles distant from your railroad terminal operates trains, not only in its terminal, but out through so much of the city lying from the terminal to the suburbs, without the emission of smoke, does it not?

A. They operate their passenger trains; I am not prepared to say to what extent they burn bituminous coal on their freight engines.

10 *Q.* My question was as to the emission of smoke—not the kind of fuel?

A. My answer would be this,—that where they burn anthracite they make little or no smoke.

Q. Did the question of an investigation as to how it was possible for a railroad company operating a terminal two and a half miles distant from the terminal of your company, to operate its terminal and its trains without the emission of smoke, ever appeal to you to the extent of making any investigation as to how they did it?

20 *A.* I cannot remember that we made any investigation of the Lackawanna.

Q. You were aware of the fact, were you not, that the Lackawanna operated its terminal and carried its trains outside of Hoboken without the emission of smoke?

A. As I said, I am perfectly aware that they handle their passenger trains; not the freight engines.

Q. But you are aware of the passenger trains operated out of its terminal in Hoboken without the emission of smoke, are you not? *A.* I am.

30 *Q.* Did it occur to you or your company, previous to sending these gentlemen to Europe to ascertain how a railroad terminal could be operated without making smoke, to make an investigation of a terminal two and a half miles distant from your company's terminal?

A. We were perfectly aware of the performance of anthracite coal; we have never felt prepared to design our locomotives to burn that anthracite coal.

Q. Coke is the product of what?

A. Partial combustion of bituminous coal.

40 *Q.* Of bituminous coal? *A.* Yes, sir.

Q. Isn't a fact, Mr. Gibbs, that coke is produced from the extraction of gas from anthracite coal? *A.* No, sir.

Q. Can you take bituminous coal, soft particles which is more or less dust and make coke out of it?

A. Yes, sir; all coke is made from bituminous coal; none is made from anthracite.

Q. All the coke I have seen is in large lumps?

A. When that coal is heated it swells; it has a bituminous or tarry matter and it swells up; this dust glutinizes and drives off the gas, and finally you get this hard silvery coke.

Q. Your company, you have testified, Mr. Gibbs, have tested from 95 to 100 different kinds of coal?

A. With this locomotive testing plant?

Q. For what purpose did you test 95 to 100 different kinds 10 of coal?

A. I tried to explain that; we had coal from about 100 different ones and the character of the coal differs considerably according to the region from which it is derived.

Q. So I understand—for what purpose did you test it?

A. We tested these coals to determine their economic value; the capacity of the locomotive for using the different coals which varies considerably in different regions.

Q. Now tell me what you tested them for?

A. To find out how much steam they would make. 20

Q. That is what I asked you?

A. That is the value, sir—to see how much steam the different coals would make, how much smoke, and which ones we should buy.

Q. What kind of coal are you burning at present in this railroad company?

A. We are burning bituminous coal.

Q. What kind? A. In our passenger engines we are using what is called gas coal.

Q. Is that a coal that is known among the coal dealers as 80 gas coal or hasn't it any different name than that?

A. It is gas coal.

Q. My question is, is it known as gas coal?

A. The gas coal is a coal having from 55 to 57 per cent. of fixed carbon, from 35 to 37 per cent. of volatile material and the remainder ash; it is a coal that is mined in Pennsylvania near Pittsburg, and is very largely used for making gas at the gas works, and from that it gets its name; we use it because of all coals we have ever used we can get more work out of our locomotives, we can run our trains better. 40

Q. What kind of coal do you use on the Pennsylvania railroad at the present time?

A. We use in our passenger trains—we are using that gas coal.

Q. Is that the only name by which you know it?

A. That is the only name.

Q. I want to know the name and the kind of coal you are using on the Pennsylvania railroad at the present time.

A. I will tell you the best I know; if you want the names of the mines I will give you the names; we are using on our passenger engines coal from the Westmoreland Company, Penn Gas Coal Company, the Arona Company, Claridge Company, the Sewickley Company, the Manor Coal Company, the Penn Manor Company, New York and Cleveland Coal Company; I don't remember any others, but they are all in the Irwin basin of Pennsylvania; I cannot give you any more definite information than that.

Q. You have given me in answer to my question the names of the various coal companies from which you buy coal?

A. I have, and any coal man will tell you what those coals are if you mention the mines.

Q. I am asking the question of you as to what kind of coal you burn on the Pennsylvania Railroad Company, irrespective of who you buy it from?

A. I don't know how to answer your question; we burn gas coal and bituminous coal and but from certain mines.

Q. Then the only information I can get is the coal mines?

A. What kind of information do you want?

Q. You told me in answer to a previous question especially to ask that question of a coal man?

A. I told you I gave you those names of the mines so that any other man experienced in coal would give you the name.

Q. You gave me the names of the companies selling the coal?

A. Yes, that is all the names of the mines, every one of them—Westmoreland mine at Export, Pa.; Penn Gas Company, Penn mines, in the Irwin basin, Westmoreland county; Arona, the same, Arona mine, in the same basin; the Claridge mine, the Sewickley mine, the Manor coal mine of Manor, Westmoreland county, Pa.; Penn Manor Company, mine in the same basin; New York and Cleveland coal mine, that is in the same basin, and also on the Allegheny river, what is called Plum Creek mine. Your question as I understand it was broader; we burn in our freight engines other kinds of bituminous coals coming from a wide field; the entire field is west of the Allegheny mountains in the counties of Cambria, Clearfield, Somerset, Indiana, Westmoreland; I forget some other counties along the Allegheny river.

Q. The heavy work of a locomotive engine, so far as your personal observation and your education leads you to know is developed more especially on upgrades, is it not?

A. No, not necessarily, but as a rule yes; but where we have level grades we make heavier trains.

Q. And where a train is running down grade the natural gravitation would carry the train to the termination of the down grade? *A.* Yes, sir.

Q. And during the time that the engine is travelling down grade there is no work whatever put on the engine? 10

A. Practically none.

Q. And during such a distance over the road that such engine is travelling down grade there is practically no consumption of coal?

A. There is consumption of coal because of the fire that is there; that fire burns up but there should be very little smoke emission if the fire has been properly handled.

Q. That is, down grade? *A.* Down grade.

Q. Then if any witness who was called on behalf of the plaintiff in this action inadvertently testified that the emission of smoke from a locomotive running down grade was greater than the emission of smoke from a locomotive running upgrade, he certainly made an incorrect statement, did he not? 20

Mr. Wall—Objected to by defendant on the ground that the witness is not called upon to characterise or criticise the testimony of witnesses heretofore called in this case.

A. I don't think necessarily, sir; here is the condition; if you are working a locomotive uphill you have a very bright fire and you may be making very little smoke; when you shut off your steam you shut off your draft at the same moment and there is for a time the emission of the very densest kind of smoke because the draft has been shut off, but there should be if a man is careful, taking it in time, he very frequently can let his fire burn down before he shuts off. 30

Q. That is travelling upgrade?

A. If you stop one of our trains working hard without warning you will make the densest kind of smoke because the fire is giving off the most amount of gases and if you shut off the draft you shut off the air.

Q. And if you don't shut off the draft you don't get that emission of smoke? 40

A. No. If you go down hill you shut the engine off and you shut the draft off.

Q. In traveling down grade what would you say as to the emission of smoke from an engine?

A. As I say, if he has just been working hard and turns down that grade he will make some smoke in the beginning.

Q. At the commencement of the down grade?

A. Yes; that smoke ought to stop because he ought to have sense enough to stop putting coal on.

Q. After a short distance the emission of smoke should be
10 eliminated?

A. Very short period of time.

Q. Then if any witness called in this proceeding had testified that the emission of smoke was greater on going down grade than going upgrade, he made a mistake, did he not, according to your opinion?

Mr. Wall—Objected to by defendant on the same ground as before, that this witness is not called upon to characterize or criticise the testimony of witnesses heretofore called in this case.

20 *A.* I would infer that the man was not as careful as he should have been.

Q. In his testimony? *A.* No, sir; the man running his engine.

Q. You testified in answer to a question asked you by the counsel for the defendant that one of the elements in your judgment which entered into the question of operating a locomotive engine without the emission of smoke, engine burning bituminous coal, was everlasting supervision—I believed you used those words? *A.* Yes, sir.

Q. What do you mean by everlasting supervision—what do you mean by that?

30 *A.* It means instructing; it means following up the men and seeing that the instructions are carried out, observation not only by the instructors but by others; to see whether a man is a continual offender, and finally by discipline.

Q. And by a fireman doing and performing the various acts which he would perform under everlasting supervision would result in the operation of an engine by him burning bituminous coal which would emit practically no black smoke?

A. I don't say that; with the least possible amount of black smoke.

40 *Q.* The least possible amount of black smoke?

A. I wouldn't say it is possible to entirely avoid it, but it can be reduced between a good man and a poor man.

Q. The difference in the quantity of smoke emitted from an engine burning bituminous coal fired by a careful scientific man who obeys instructions, due to everlasting supervision, is how much, as compared with the fireman who is careless or indifferent or ignores the instructions of everlasting supervision?

A. I wouldn't care to be pinned down to a figure.

Q. Approximately, generally speaking?

A. A good man, I should say, would not make more than half—probably less.

Q. Less than a half? *A.* I should say so.

10

Q. Than an inefficient man would make?

Q. There is no way of telling how much an inefficient man would make; a good man will make comparatively little; all will make some.

Q. And the man who makes comparatively little would create a quantity which would not to the ordinary individual living on the line of the road amount to a serious annoyance or inconvenience?

Mr. Wall—Objected to by defendant as too general and impossible to answer, there being no standard as 20 to what people would object to.

A. Under the best of circumstances we will make some, in some conditions; when you are starting, before you have time to get a fire in good shape, or when a locomotive is working to its utmost, the best man will make smoke, but the difference between the good man and the bad man is very marked because the bad man is making it all the time, or mostly.

Q. I believe you testified Mr. Gibbs, that the present output of the mines mining anthracite was something like 70,000,000 tons a year? 30

A. In 1907, I couldn't tell at present.

Q. Those figures are in your mind from what is the generally accepted knowledge on that subject based from reports of various geological surveys of the United States Government and the State of Pennsylvania?

A. I forget now whether I took that from a report of the geological survey.

Q. But it is about right? *A.* About right.

Q. Have you any idea or knowledge as to what is estimated by the United States Government and by the State of Pennsylvania to be the amount of available anthracite coal, or don't you know that? 40

A. I don't know; I have seen the figure; I don't remember it.

Q. You are familiar with the publication known as the Encyclopedia Britannica? A. Not well acquainted.

Q. You know the work. A. Yes.

Q. You consider the publication an authoritative publication on the various subjects discussed in that publication?

A. I believe it is a careful work.

Q. There may be inaccuracies, of course, in it?

A. I should say it is a good publication.

Q. It is recognized the world over, is it not, as an authoritative publication?

Mr. Wall—Objected to by defendant as too general and the witness' attention should be directed to some definite statement in the Encyclopedia.

A. It is a publication having a high standard.

Q. I believe you stated that you have no data or information at the present moment at hand as to the amount of available anthracite which has not as yet been mined? A. No, sir.

Q. Do you remember about when the coal strike was?

20 A. The last great coal strike was 1902, closed up about January, 1903; then there has been a later coal strike; my impression is that it started in April, 1909, and lasted pretty near all through the year 1909.

Q. Well, what we all know as or call the coal strike, with which we are more or less familiar is the coal strike of 1902-3?

A. Yes, from April, 1902, until about December, 1902.

Q. It ran eight or nine months, more or less? A. Yes.

Q. Previous to that time various railroads in this country had been using anthracite coal, had they not, which are now using bituminous coal?

30 Mr. Wall—Objected to by defendant as irrelevant.

A. I am not in position to answer that question, sir; I have a general knowledge on the subject; I am very clear about the other because I have been in direct touch; since the coal strike I have been in direct touch with the situation.

RE-DIRECT, by Mr. WALL:

Q. Mr. Gibbs, you were asked about the actual tests made by you in Germany or information acquired by them in Germany and devices there used—what was the device that your attention was called to by your reading and by the report of the committee?

40 Mr. Hardenbrook—Objected to by complainant as irrelevant, incompetent and immaterial, based entirely upon hearsay.

Q. Did you ever have any knowledge of the experiments made of that German device in this country subsequent to the report of the committee?

A. Yes, we have one running on the Pennsylvania Railroad now.

Q. And has that come under your direct knowledge?

A. I have not received the final report. I have received a report of the test.

Q. Hasn't it come under your supervision so you were able to ascertain the result? 10

A. No, Mr. Wall; you must understand that I am not in my position able to go out and see these things; we have a department especially for the purpose of making tests; we have competent men running that department and they make these tests and make formal written reports, and I judge from them and I must judge from them.

Q. You have followed the results of those tests as so far made?

A. I follow them up; I don't make them.

JOHN C. MENDEL, called as a witness by the defendant, 20 being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. WALL:

Q. What is your employment?

A. I am master mechanic at the Altoona machine shops.

Q. Are those the largest shops of the Pennsylvania Railroad Company? A. Yes.

Q. Main shops? A. Yes, main shops.

Q. And how long have you been with the company?

A. Since September, 1882, 29 years.

Q. And in what capacity did you first go there? 30

A. I entered the service as an apprentice, served four years; then I worked as a machinist; then as assistant to the master mechanic, then master mechanic.

Q. Have you been master mechanic at more than one shop?

A. Yes, I have been master mechanic at six shops.

Q. Do you know Mr. Gibbs? A. Yes, sir.

Q. He spoke of the committee that went abroad—did you have any knowledge of the workings of that committee?

A. Yes, I was a member of the committee, in April, 1910.

Q. You were chairman of the committee? 40

A. I was chairman of the committee.

Q. Where did you go?

A. Under the direction of Mr. Gibbs, our general manager, we went to England, Germany and France.

Q. What did you do in those countries?

A. For the purpose of investigating the devices used to diminish the emission of smoke from locomotives, particularly at the large terminals, such as London, Paris, Berlin and other large places in those countries.

Q. What did you find in reference to the relative efficiency of the foreign fireman and the American fireman?

10 *Mr. Hardenbrook—*Objected to by complainant as irrelevant, incompetent and immaterial, not within the issues involved in the action.

A. We didn't consider that the firemen of either of the countries I have named were as skilful in firing as the firemen on our railroad.

Mr. Hardenbrook—I move to strike out the answer as irresponsible.

Q. What methods did you employ to determine the questions which you were sent there to solve?

20 *Mr. Hardenbrook—*Objected to by complainant as irrelevant, incompetent and immaterial.

A. We had letters of introduction to the railway officials and to some of the government officials in the countries where the roads were controlled by the government, such as Germany, and from inquiries made from the officials and observations made at the terminals and the instructions and the process, and by riding on the locomotives with the firemen.

Q. You made a thorough investigation of all the European systems in the countries which you visited?

30 *A.* We made an investigation of the principal railroads of the three countries that I have named—England, Germany and France.

Q. And what did you find as to the emission of smoke on the German locomotives?

*Mr. Hardenbrook—*Objected to as irrelevant, incompetent and immaterial.

A. The German locomotives were emitting considerable smoke—especially on those which were not equipped with the Marcotty device.

40 *Q.* How about the system of inspection of the firemen—supervision of the firemen?

*Mr. Hardenbrook—*Objected to by complainant as irrelevant, incompetent and immaterial.

A. The supervision is not nearly so great as with us.

Q. How about it in England?

Mr. Hardenbrook—Objected to by complainant as irrelevant, incompetent and immaterial.

A. The same thing in England.

Q. Do you as master mechanic have anything to do with the question of the emission of smoke?

A. Yes, as master mechanic we have charge of the engine houses where the engines are prepared for the road and also of the despatching of the engine crews. 10

Q. Is the railroad spending any money for supervision?

A. Yes, a very great deal; probably more than any other railroad of this country or any other country. Yes, I mean to say that the Pennsylvania is probably spending more for the instruction and supervision of their men than any railroad that I know of.

Q. Have you any knowledge of how much they are spending?

Mr. Hardenbrook—Objected to by complainant as incompetent, irrelevant and immaterial.

A. I had occasion to look that up some six months ago and 20 I found —

Counsel for complainant says he will admit they are spending \$100,000 a month; counsel for defendant won't take the admission; we want the fact.

On the division terminating at Philadelphia it amounted to \$8,000 per month. By that I mean the men, the road foremen of engines, their assistants, firemen instructors and other men in the road foreman's department whose particular duty is to instruct the enginemen and firemen as to the economical methods of firing the locomotive, to prevent the emission of objectionable smoke. 30

Q. Did you not also serve on some committee appointed by the Master Mechanics' Association of this country? A. Yes, sir.

Q. When was that? A. This year, 1911.

Q. What was that for?

A. We were appointed by the Master Mechanics' Association for the purpose of looking into the processes of firing up and handling locomotives at terminals with a view of recommending some practice to reduce smoke.

CROSS-EXAMINATION, by Mr. HARDENBROOK:

Q. Mr. Mengel, you want to help this railroad company out of its difficulties, don't you? A. Yes, I always do. 40

Q. You have been with the road for many years?

Q. Twenty-nine years.

Q. And you are satisfied, are you not, from the number of years experience that you have had that the Pennsylvania Railroad Company by efficient firemen, even burning soft coal, that a great deal of the complaints of the citizens regarding the smoke would be obviated if the firemen would do their duty and do as they were told—that would eliminate to a great extent the nuisance of which the people along the road complain.

10 Mr. Wall—Objected to by defendant as too general and incapable to answer, and containing a false assumption, that the people would be reasonable about the matter.

A. Do you want me to answer the question?

Q. It is up to you.

A. The emission of smoke from locomotives can be very much reduced by skilful firemen, what we call skilful firing, but you must remember that with the fluctuation in business on the railroad and the number of new firemen that it is necessary to

20 put on annually, those men must be instructed, which requires time.

Q. But a man after he is instructed and who after he is instructed will follow the instructions should be able to operate the engine with practically little nuisance to the people along the road, should they not?

A. A man that has been instructed and follows his instructions will make very much less smoke than an inexperienced man. We exercise a great deal of care in instructing our men, not only by verbal instructions but by printed instructions and by lectures and having them visit our test plant and to follow these things as closely as it is possible to follow them when they are doing the work of the road.

30 Q. And it has been your experience, has it not, that a great many of these firemen after listening to your lectures and listening to and hearing the instructions given them, go out on the road, careless and indifferent to the instructions they have received, and don't follow them?

Mr. Wall—Objected to by defendant on the ground that it is irrelevant and immaterial, this not being an inquiry into the defects of human nature.

40 A. There are some men who do not always follow the instructions; in such cases we call them to task and administer a caution or reprimand and suspensions for violating their in-

structions, the same as we do for violating other instructions.

Q. You are familiar with the operation of the Pennsylvania Railroad outside of Jersey City, outside of the terminal in Jersey City, until it reaches the suburbs of this city, to some considerable extent, are you?

A. I have never been located in Jersey City. Of course I have been over here a number of times.

Q. What procedure would you suggest as a practical railroad man to eliminate the nuisance of the soft coal smoke of the Pennsylvania Railroad in Jersey City, if you had the matter in 10 your hands, what method would you suggest?

A. I don't know of any other than what we are following.

JOHN C. MENGEI, recalled by counsel for complainant:
By Mr. HARDENBROOK:

Q. You spoke about paying something like \$8,000 a month to employees or various people employed by your road to instruct firemen as to how to operate locomotives without the emission of smoke, did you not, or reducing the emission of smoke?

A. Yes, I explained what their duties were for the economical 30 operation of the road.

Q. You explained that by saying they were paying \$8,000 a month?

A. Yes, on the division terminating at Philadelphia.

Q. Why don't the company devote that \$9,000 a month to the buying of anthracite coal?

A. Because we don't get the results from anthracite coal in our service that we do from bituminous coal.

JOHN M. JAMES, called as a witness by the defendant, 30 being duly sworn according to law, on oath testified as follows:

DIRECT EXAMINATION, by Mr. WALL:

Q. Who are you employed by?

A. The Pennsylvania Railroad Company.

Q. In what capacity?

A. Master mechanic in the West Philadelphia shops.

Q. Have you had occasion to visit different places in this country for the purpose of studying the problem of eliminating the emission of smoke? *A.* Yes, sir.

Q. Where have you gone in such studies?

A. Washington, Boston, St. Louis and Chicago.

Q. How do the results attained by other railroads in this country at the places you have visited in the attempt to min-

imize the emission of smoke compare with the results attained by the Pennsylvania Railroad Company?

Mr. Hardenbrook—Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. At none of the terminals visited did we find that the results obtained were as good as those obtained here under similar conditions.

No cross-examination.

Taking of further testimony in the above-entitled matter adjourned to Monday, October 9th, 1911, at 10:30 A. M.

United States Circuit Court, District of New Jersey.

ROMAN CATHOLIC CHURCH OF ST.

ANTHONY OF PADUA,

Complainant,

vs.

30 THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant.

Testimony taken in the above-entitled matter before Hon. George R. Beach, Examiner, duly appointed by order of Judge Joseph Cross; hearing at the office of Mr. Beach, 75 Montgomery street, Jersey City, New Jersey, on the 9th day of October, nineteen hundred and eleven, at 10:30 A. M.

30 Appearances—MR. FRANK M. HARDENBROOK, of counsel for complainant; MR. ALBERT C. WALL, of counsel for defendant.

MARTIN L. GARDNER, recalled as a witness by and on behalf of defendant, having been previously sworn, on oath testified as follows:

DIRECT EXAMINATION, by Mr. WALL:

Mr. Wall—I offer in evidence a true copy of the map filed in the office of the Secretary of State of New Jersey, showing a survey and center lines of the right of way of Harsimus Cove branch of the Pennsylvania Railroad Company.

Marked Defendant's Ex. 8, Oct. 9, 1911, J. H. C.

Q. Mr. Gardner, will you produce your map showing the

acquisition of title to the lots within the right of way and near the property of the Roman Catholic Church of St. Anthony of Padua? *A.* I will.

Q. It is a map showing the devolution of title for the lands along the right of way which you are about to indicate? *A.* It is.

Q. Does the map show that?

A. It does; in volume 4, starting on the easterly line of Brunswick street, we find in volume 4 —

Q. Volume 4 that you refer to is what?

A. The volume you are now looking at, which contains the 10 important memoranda concerning certain original deeds by which the company acquired title to the plots therein mentioned.

The original deed as recorded is Edward Coles, sole acting executor of William F. Coles, deceased, to the N. J. R. R. and T. Co., dated October 1, 1868, recorded in Hudson county, November 3, 1868, in book 178, page 565.

The next property adjacent to the east, Andrew C. Morris and others, volume 4, page 115, being a deed from Andrew C. Morris et al., surviving trustees to, etc., of William F. Coles, deceased, only surviving trustee of Eliza F. Morris, to N. J. R. R. and 20 T. Co., dated October 1, 1868, recorded November 3, 1868, in book 178, page 572.

The next property to the east, John B. Coles and others, volume 4, page 116; John B. Coles and others to N. J. R. R. and T. Co., dated December 19, 1868, recorded December 22, 1868, in book 181, at page 351.

The next property adjacent to the east, Andrew C. Morris and others, volume 4, page 115, which carries that block from Division street to Brunswick street. Trustees' deed dated October 1, 1868, Andrew C. Morris and others to N. J. R. R. and T. Co., recorded November 3, 1868, in book 178, page 568.

Mr. Hardenbrook—Counsel for complainant makes no objection to the offer in evidence of transcripts of deeds on the ground that they are not full and complete copies; neither does the counsel make any objection to plats going in evidence showing deeds of conveyance or showing memoranda of deeds and grantors in the deeds of conveyance to the defendant company, for land situated on the right of way of the defendant company between Monmouth street and Division street in the city of Jersey City, Hudson county, New Jersey, and such transcripts may be filed with the Examiner at any time within fifteen days from date. 40

Witness continues—

From the easterly line of Brunswick street, in an easterly direction, Emily Neilson, book 4, page 113, Emily Neilson to N. J. R. R. and T. Co., dated October 1, 1868, and recorded November 3, 1868, in book 178, page 579.

The next, volume 4, page 114, William H. Neilson to the same railroad company, deed dated Oct. 1, 1868, and recorded November 3, 1868, in book 178 at page 576.

The next east, volume 54, page 112, Charles D. Clark to U. N
10 J. R. R. & T. Co., dated June 15, 1877, book 314, page 500.

The next east, volume 4, page 69, Robert C. Bacot to N. J. R. R. & T. Co., dated December 14, 1868, recorded May 15, 1869, in book 190, page 705.

The next east, toward the east, volume 4, page 111, Edward Coles, executor of William F. Coles, deceased, to N. J. R. R. & T. Co., dated October 1, 1868, recorded November 3, 1868, in book 178, page 565.

The next toward the east which carries the right of way to the westerly line of Monmouth street, volume 4, page 62, Robert
20 C. Bacot to N. J. R. R. & T. Co., dated October 5, 1868, recorded October 24, 1868, in book 175 at page 638.

Mr. Wall—I also offer in evidence plat showing the same information graphically that has been testified to above.

Received in evidence and marked Defendant's Ex. 9, October 9, 1911, J. H. C.

Mr. Wall—I ask leave to pick out and submit within said fifteen days and have placed in evidence any and all deeds affecting the title of the Church Complainant or the rectory or the school, which is or are duly recorded.
30

Mr. Hardenbrook—It is consented that the same may be received in evidence and marked as Exhibits as of this date, October 9, 1911.

Mr. Hardenbrook—It is also consented that no objection be interposed as to the agency of Robert C. Bacot, grantor named in various deeds offered in evidence on behalf of the defendant, and it is stipulated that he did act as an agent for the railroad company.

40 Defendant rests.

Complainant rests.

Case closed.

United States Circuit Court, District of New Jersey.

ROMAN CATHOLIC CHURCH OF ST.
 ANTHONY OF PADUA,
Complainant,
 vs.
 THE PENNSYLVANIA RAILROAD
 COMPANY,
Defendant.

Hearing in the above-entitled matter before George R. Beach,
 Esq., Examiner, at his office, 75 Montgomery street, Jersey City, 10
 N. J., on the 19th day of October, 1911, at 10 o'clock.

The following are offers on behalf of the defendant, the Pennsylvania Railroad Company, in accordance with stipulation and agreement of counsel, at the hearing of October 9th, 1911.

Mr. WALL:

Pursuant to the stipulations found in the testimony taken at the last hearing, I offer colored map or blue print showing the deeds from which the company acquired title for lands between Division street and Monmouth street, in its right of way, being 20 the same lands referred to in the testimony of Martin L. Gardner, given at the last hearing.

Marked Deft's Ex. 10, October 19, 1911, J. H. C.

I offer the deeds with the plots marked on the last Exhibit from left to right, Coles to New Jersey Railroad and Transportation Company.

Marked Deft's Ex. 11, October 19, 1911, J. H. C.

I offer deed from Morris et als. to the same grantee.

Marked Deft's Ex. 12, October 19, 1911, J. H. C.

I offer deed from Coles to the same grantee.

Marked Deft's Ex. 13, October 19, 1911, J. H. C.

I offer deed from Emily Neilson to the same grantee.

Marked Deft's Ex. 14, October 19, 1911, J. H. C.

I offer deed from William H. Neilson to the same grantee.

Marked Deft's Ex. 15, October 19, 1911, J. H. C.

I offer deed from Charles G. Clarke to the same grantee.

Marked Deft's Ex. 16, October 19, 1911, J. H. C.

I offer deed from Robert C. Bacot to the same grantee.

Marked Deft's Ex. 17, October 19, 1911, J. H. C.

I offer deed from Robert C. Bacot to the same grantee.

Marked Deft's Ex. 18, October 19, 1911, J. H. C.

30

40

I also offer four deeds in the chain of title of the church, rectory and school, as follows:

Deed from Homer Ramsdell et ux., to William W. Carson and Charles G. Carson, dated February 17, 1868.

Marked Deft's Ex. 19, October 19, 1911, J. H. C.

Deed from DeWitt Tappan et ux. and Eliza G. Coles, widow of John G. Coles, to Bridget Doyle, dated May 12, 1868.

Marked Deft's Ex. 20, October 19, 1911, J. H. C.

Deed from William Carson to Dennis McLaughlin, dated 10 May 19, 1884.

Marked Deft's Ex. 21, October 19, 1911, J. H. C.

Deed, Alfred Neilson et ux. Defts., by See, Special Master, to Frank J. Mathews, dated July 5, 1895.

Marked Deft's Ex. 22, October 19, 1911, J. H. C.

Minutes of Court.

United States District Court, District of New Jersey.

Tuesday, February 4, 1913.

Court met at 10:30 o'clock A. M.

Present—Hon. JOHN REILSTAD, Judge; Clerk and Marshal.

ROMAN CATHOLIC CHURCH OF ST.

ANTHONY OF PADUA

vs.

PENNSYLVANIA RAILROAD COMPANY.

In Equity.

29

Judge Reilstad announced in open court that he found for the Defendant in the above cause.

District Court of the United States, District of New Jersey.

29

THE ROMAN CATHOLIC CHURCH OF ST.

ANTHONY OF PADUA,

Plaintiff.

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

Defendant.

No.
In Equity.
On Bill.**Final Decree.**

(Filed February 15, 1913.)

29

At the September Term of the District Court of the United States for the District of New Jersey, in the Third Circuit, held at the United States Court Room in the City of Trenton on the 19th day of February in the year of our Lord One thousand nine hundred and thirteen:

Present—Hon. JOHN REILSTAD, District Judge.

This cause came on to be heard at the April Term of the Circuit Court in the year of our Lord one thousand nine hundred and twelve, and was argued by counsel and was continued for advisement until the present term, and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows:

29

That the defendant has not maintained or operated upon Sixth Street in the City of Jersey City a line of railroad tracks.

That the defendant, operating its road under legislative authority, has not taken, and does not take from the complainant any property to which the complainant is legally entitled.

That the acts of the defendant in the operation of its railroad have not constituted, and do not constitute a nuisance and are not so unnecessary, avoidable and unreasonable as to warrant the **10** issuing of an injunction restraining it from the use of soft or bituminous coal in the operation by the defendant of this railroad.

And it is ordered, adjudged and decreed that the bill of complaint be dismissed and that the defendant be hence discharged with its reasonable costs and charges.

JOHN RELLSTAB,

Judge.

20

United States District Court. District of New Jersey.

THE ROMAN CATHOLIC CHURCH OF SAINT
ANTHONY OF PADUA, JERSEY CITY,

Complainant and Appellant

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Defendant and Appellee.

In Equity.

30

Assignment of Errors.

(*Filed February 24, 1913.*)

And now on this 21st day of February, 1913, comes the complainant by its solicitor Frank M. Hardenbrook, and says that the decree entered in this honorable court in the above cause on the 15th day of February, 1913, is erroneous and unjust to the complainant in the following particulars.

1st. That the said District Court erred in dismissing the bill **40** of complaint therein.

2nd. The said District Court erred in adjudging and finding in its decree that the defendant, operating its road under legislative authority, has not taken, and does not take from the com-

plainant any property to which the complainant is legally entitled.

3rd. The said District Court erred in adjudging and finding in its decree that acts of the defendant in the operation of its railroad, have not constituted, and do not constitute a nuisance and are not unnecessary, avoidable and unreasonable, but are necessarily connected with the construction and reasonable operation by the defendant of this railroad.

4th. That the said District Court erred in disregarding the protest and objection of the complainant to the aforesaid findings and conclusions embodied in its decree. **10**

5th. That the District Court erred in not granting an injunction pursuant to the prayer of the bill of complaint.

6th. That the said District Court erred in not awarding to the complainant damages against the defendant pursuant to the prayer of the bill of complaint.

7th. That the Court erred in denying the complainant's motion to amend the bill of complaint, before the argument of the cause, and in the making of the order of said Court on the 22d day of July, 1912. **20**

8th. The Court erred in not finding that the complainant's structures are of substantial construction, and are except for the acts of the defendant, adapted to their respective purposes; and that the immediate neighborhood thereof is thickly populated and is exclusively a residential district.

9th. The Court erred in not finding that the defendant in the operation of its railroad, maintained up to 1901 and operated south of Sixth St., and immediately to the south of the lands and structures of the complainant, a line of railroad consisting of two tracks, upon which it operated a number of freight trains, and which was increased to eight tracks in 1901. **30**

10th. That the Court erred in not finding that since 1901, trains, cars, switch engines and locomotives, continuously at all hours of the day and night, passed upon the said tracks the lands and premises, and structures of the complainant, and which engines and locomotives since 1902 burned and are burning continuously vast quantities of soft bituminous coal.

11th. The Court erred in not finding that from the burning and partial combustion of which soft and bituminous coal, there arises, and continuously since 1902 has arisen dense volumes of black smoke, soot, cinders and ashes, noxious and unwholesome gases, offensive odors, which are carried into, upon and through the structures and premises of the complainant. **40**

12th. The Court erred in not finding that the emission of such soot, smoke, cinders and ashes, seriously injured the complainant's buildings, and the use for their respective purposes.

13th. The Court erred in not finding that the operation of the said trains and engines is, and throughout said time has been attended with noises sufficient in extent to interrupt the services in the church, and rendered it impossible for the complainant to occupy its church with any comfort as a place of worship.

10 14th. The Court erred in not finding that the rumbling of the engines passing in and along its tracks, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the engines with its cinders, dust and offensive odors, created a constant disturbance of the religious exercises in complainant's church.

15th. The Court erred in not finding that the noise of the engines was often so great that the voice of the pastor could not be heard.

20 16th. The Court erred in not finding that the smoke and cinders from defendant's engines sometimes entered the church in such quantities as to cover the seats with dust and soot, and soil the garments of the worshippers.

17th. The Court erred in not finding that disagreeable odors, added to the noise, smoke and cinders, rendering the church not only uncomfortable, but also unendurable as a place of worship.

30 18th. The Court erred in not finding that the enjoyment of the complainant and the congregation in the church as a place of religious exercises, and for prayer and worship, was disturbed by the said acts of the defendant.

19th. The Court erred in not finding that the operation of the said trains and engines, is and throughout said time has been attended with noises sufficient in extent to interrupt the teaching in the school, and rendered it impossible for the complainant to occupy the school with any comfort as a place of teaching.

20th. The Court erred in not finding that the rumbling of the engines passing in and along its tracks, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the engines with its cinders, dust and offensive odors, created a constant disturbance of the teachings and lessons in complainant's school.

21st. The Court erred in not finding that the noise of the engines was often so great, that the voice of the teachers could not be heard.

22d. The Court erred in not finding that the smoke and cinders from defendant's engines sometimes entered the said school in such quantities, as to cover the seats with dust and soot, and soil the garments of the children.

23d. The Court erred in not finding that disagreeable odors, added to the noise, smoke and cinders, rendered the school not only uncomfortable, but also unendurable as a place of teaching.

24th. The Court erred in not finding that the enjoyment of the complainant, and the children in the school as a place of teaching, was disturbed by the said acts of the defendant. 10

25th. The Court erred in not finding that the operation of the defendant's trains and engines is, and throughout said time has been attended with noises sufficient in extent to render it impossible for the complainant's officiating priests and attendants to occupy its rectory with any comfort.

26th. The Court erred in not finding that the rumbling of the engines passing in and along its tracks, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the engines with its cinders, dust and offensive odors, created a disturbance of the rest, comfort and repose of the 20 officiating priests and their attendants.

27th. The Court erred in not finding that the smoke and cinders from defendant's engines, sometimes entered complainant's rectory in such quantities as to cover the walls, floors, desks, furniture and beds with soot, coal, dust and smoke and soil the garments of the officiating priests and their attendants.

28th. The Court erred in not finding that disagreeable odors, added to the noise, smoke and cinders, rendered the rectory not only uncomfortable, but also unendurable as a place of residence. 30

29th. The Court erred in not finding that the occupation and use made of the defendants of the tracks opposite to the complaint's structures, is that of a freight yard, and is used almost exclusively in the making up and switching of trains.

30th. The Court erred in not finding that the defendants in the location of its freight yard at that point acted in a private and public capacity.

31st. The Court erred in not finding that the defendant could at all times have effectively operated its railroad with a non-smoke producing fuel. 40

32d. The Court erred in not finding that soft or bituminous coal could, by careful firing, be burned so as not to produce smoke in sufficient quantities to be objectionable.

33d. The Court erred in not finding that the smoke produced by the defendant's engines was unreasonable and unnecessary.

34th. The Court erred in not finding that the smoke produced by the defendant, was due to the negligence of the defendant in burning a smoke-producing coal.

35th. The Court erred in not finding that the smoke produced by the defendant, was due to the negligent and unskillful use and firing of coal by its firemen.

36th. The Court erred in not finding that the negligence of **10** the firemen was that of the defendants in not subjecting them to supervision.

37th. The Court erred in not finding that where the acts of the defendant in drilling its cars, &c., amounted to a legal nuisance to the complainant's structures adjacent to the track complained of, and it cannot defend and justify such acts on the grounds of necessity or adverse user.

38th. The Court erred in not finding that whatever prevents the comfortable use of the property by the members of the congregation or those who, by its permission, unite with them in **20** the church, in a disturbance or annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult.

39th. The Court erred in not finding that to take or impair these rights of the complainant is to take the right of exclusion, and there is a partial taking to the lots, as much as if one corner was cut off and the rule of compensation must be applied.

40th. The Court erred in not finding that the easement of light and air are so much property as the lots themselves, and an interference with which constitutes a taking of private property without compensation.

41st. The Court erred in not finding that whenever the exercise of a right operates to destroy an easement incident to real property or amounts to an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, that this is a taking of property.

42nd. The Court erred in not finding that there need not be an exclusive appropriation of the property, but such an interference with the beneficial use thereof as operates an essential abridgement of the owner's rights incident to, and an essential **40** part of the estate.

43rd. The Court erred in not finding that the maintenance of a nuisance to real estate amounts to a taking of private property and cannot be legalized by a legislature even upon terms of compensation.

44th. The Court erred in not finding that for such annoyance and discomfort, the courts of law will afford redress and give damages against the wrongdoer, and when the cause of annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance.

45th. The Court erred in not finding that the acts of the defendant have taken from the complainant property consisting of the easement of light and air, without due process of law and without compensation, and is a violation of the provisions of the Constitution of the United States. 10

46th. The Court erred in not finding that the annoyance is so great as to destroy or substantially impair the legitimate use of complainant's property, and the complainant is entitled to a re-dress.

47th. The Court erred in not finding that said acts of the defendant are continuous and will cause great and irreparable loss to the complainant and subject it to the prosecution of a multiplicity of suits for damages, unless defendant be restrained therefrom by the injunction.

48th. The Court erred in not finding that a Court of Equity is bound to give preventative relief and to refuse it is to allow the defendant to take the complainant's property upon terms of paying such compensation from time to time, as the jury may assess. 20

49th. The Court erred in not finding that the right of the complainant to recover for the annoyance and discomfort of its members in the use of its property and the liability of the defendant to respond in damage for causing them, are not affected by their corporate charter.

50th. The Court erred in not finding that the said acts of the defendant are avoidable and unreasonable, and not necessarily connected with the construction or a reasonable and careful operation of the railroad. 30

51st. The Court erred in not finding that the defendant cannot claim exemption from liability for a nuisance maintained by it in the operation of its railway, whereby private is damaged, because it is operating under a charter giving the right to do business.

52nd. The Court erred in not finding that the defendant is a private corporation, though its uses are public. 40

53rd. The Court erred in not finding that the common good must yield to the private right.

54th. The Court erred in not finding that that which is au-

thorized by the Legislature within the strict scope of, is constitutional power cannot be a public nuisance, but that it may be a private nuisance; and that the legislative grant is no protection against action for damages resulting therefrom.

55th. The Court erred in not finding that where a defendant acquires a land for terminal purposes in the heart of a city, it cannot use such land in disregard of the comfort and property of others, but must adjust its operation so as to produce the least annoyance possible.

10 56th. The Court erred in not finding that the liability of the defendant of the annoyance and discomfort caused is the same as to that of individuals for a similar wrong.

57th. The Court erred in not finding that the same rule in that respect applies to corporations as to individuals.

58th. The Court erred in not finding that the defendant is equally responsible for injuries done in the course of their business by their servants.

59th. The Court erred in not finding that the defendant has not acquired a prescriptive right to operate its railroad in the manner set forth in the foregoing assignment of errors.

20 60th. The Court erred in not finding that the said acts of the defendant are a nuisance and one of special injury to the complainant.

61st. The Court erred in not finding that no decision of the State Courts of the State of New Jersey, made subsequent to the title acquired by the complainants to its lands and premises, can affect or change the rights of complainant, as found by earlier decisions of the Courts.

30 62d. The Court erred in not finding that the decision of the Supreme Court of New Jersey in the case of Beseman *vs.* Penn. R. R. Co., 50 N. J. Law 235, February 1888, did not create a rule of law exempting the defendant for its acts of nuisance, except negligence be shown, and which rule of law did not exist at the time the complainant acquired its property and which rule of law is contrary to the rule of law in existence of the time it acquired its title to its property, as decided in the cases of,

Davidson *vs.* Isham

9 New Jersey Equity 190 (Feb. 1852)

Ross *vs.* Butler

40 19 New Jersey Equity 294 (Oct. 1868)

Tinsman *vs.* B & D R. R. Co.

25 New Jersey Law 255 (Nov. 1855)

and many other cases.

63d. That the Court erred in not finding that the damage to the complainant's structures from smoke, soot, cinders and ashes of the defendants was \$11,552.71.

64th. That the Court erred in not finding that the damages for loss of comfort and annoyance to the congregation in the church, the children and teachers in the school, and the priests and their attendants in the rectory was \$40,770.00.

65th. That the Court erred in not awarding to the complainant the sum of \$52,292.71 damages.

66th. That the Court erred in granting an injunction to the complainant restraining the defendant in the manner and form as set forth in complainant's bill of complaint. 10

Wherefore and for divers other reasons in the record and decree in this cause, complainant prays that the decree herein dismissing the bill of complaint be reversed, and that the Court be directed to enter a decree in all respects in accordance with the prayer of the bill of complaint.

FRANK M. HARDENBROOK,

Sol'r for Complainant,

15 Exchange Place,

20

Jersey City, N. J.

District Court of the United States for the District of
New Jersey.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY
OF PADUA, JERSEY CITY,
Complainant and Appellant,
against
THE PENNSYLVANIA RAILROAD COMPANY,
Defendant and Appellee.

In Equity.

30

Appeal and Allowance.

(*Filed February 24, 1913.*)

The above named complainant the Roman Catholic Church of St. Anthony of Padua, Jersey City, feeling itself aggrieved by the decree made and entered in this cause of February 15th, 1913, and filed in the office of the Clerk of this Court dismissing the bill of complaint herein with costs; does hereby appeal from said decree to the Circuit Court of Appeals of the United States

for the third judicial circuit for the reasons specified in the assignment of errors filed herewith and it prays that this appeal may be allowed and that a citation issue as provided by law; and that a transcript of the record and proceedings, evidence and papers upon which said decree was based duly authenticated may be sent to the Circuit Court of Appeals of the United States for the Third Circuit and that the said decree of said District Court may be reversed and such decree made as to said Circuit Court of Appeals shall seem meet and proper.

- 10** And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

FRANK M. HARDENBROOK,
*Atty. for Ptff. and Appt. The Roman Catholic
 Church of St. Anthony of Padua, No. 15
 Exchange Place, Jersey City, N. J.*

Jersey City, N. J., Feb. 21st, 1913.

- And now to wit on February 24, 1913, it is ordered that the
20 appeal be allowed as prayed for.

JOHN RELLSTAB,
District Judge.

United States District Court, District of New Jersey.

- THE ROMAN CATHOLIC CHURCH OF SAINT
 ANTHONY OF PADUA, JERSEY CITY,
 vs.
30 THE PENNSYLVANIA RAILROAD COMPANY } In Equity.

Bond for Costs on Appeal.

(Filed February 24, 1913.)

- KNOW ALL MEN BY THESE PRESENTS, That the Roman Catholic Church of Saint Anthony of Padua as principal and Boleslaw Kwiatkowski as surety are held and firmly bound unto the above named Pennsylvania Railroad Company in the sum of
40 two hundred and fifty dollars for the payment of which well and truly to be made we bind ourselves our heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated the twenty-first day of February, in the year of our Lord one thousand nine hundred and thirteen.

WHEREAS, the above named Roman Catholic Church of Saint Anthony of Padua, Jersey City, has prosecuted an appeal to the United States Circuit Court of Appeals for the Third Circuit to reverse the decree rendered in the above suit by the judge of the District Court of the United States for the District of New Jersey.

Now therefore the condition of this obligation is such that if 10 the Roman Catholic Church of Saint Anthony of Padua, Jersey City, shall prosecute said appeal to effect and answer all costs if it fail to make said appeal good, then this obligation shall be void otherwise the same shall be and remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals and the seal of said corporation this 21st day of February, in the year nineteen hundred and thirteen.

[L. s.] ROMAN CATHOLIC CHURCH OF SAINT
 ANTHONY OF PADUA, JERSEY CITY, 20
 N. J.

By BOLESLAW KWIATKOWSKI, *Secretary.*
BOLESLAW KWIATKOWSKI [L. s.]

Subscribing witness,
FRANK M. HARDENBROOK.

The within bond approved as to form and sufficiency.

JOHN RELLSTAB,
Judge.

STATE OF NEW JERSEY, }
County of Hudson, }ss.

Be it Remembered, that on this 21st day of February, one thousand nine hundred and thirteen, before me, the subscriber, a master in chancery of said State, personally appears Boleslaw Kwiatkowski, who, being by me duly sworn, doth depose and make proof to my satisfaction that he is the Secretary and well knows the corporate seal of the Roman Catholic Church of Saint Anthony of Padua, Jersey City, the corporation named in the bond hereunto annexed, that the seal thereunto affixed is the proper corporate seal of the said corporation, that the same was so affixed thereto and the said bond signed and delivered by him, who was at the date and execution thereof the Secretary of said corporation, in the presence of the said deponent, as the volun-

tary act and deed of the said corporation, and that deponent thereupon signed the same as a subscribing witness.

FRANK M. HARDENBROOK.

Sworn to and subscribed before me at Jersey City, N. J., the date aforesaid.

ISAAC CROSS,
Master in Chancery of New Jersey.

10 STATE OF NEW JERSEY, }ss.
County of Hudson,

Be it Remembered, That on this 21st day of February, in the year of our Lord one thousand nine hundred and thirteen, before me, the subscriber, a master in Chancery of the State of New Jersey, personally appeared Boleslaw Kwiatkowski, who I am satisfied is the surety mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

20

FRANK M. HARDENBROOK,
Master in Chancery of New Jersey.

Citation on Appeal.

UNITED STATES OF AMERICA, ss.

To the Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a
30 Circuit Court of Appeals of the United States in and for the third circuit to be holden the city of Philadelphia, in the State of Pennsylvania on the 4th day of March nineteen hundred and thirteen pursuant to an appeal filed in the Clerk's office of the United States District Court in and for the District of New Jersey wherein the Roman Catholic Church of St. Anthony of Padua, Jersey City, is appellant and the Pennsylvania Railroad Company is respondent to show cause if any there be why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

40 Witness John Rellstab judge of said District Court this 26th day of February in the year nineteen hundred and thirteen.

JOHN RELLSTAB,

FRANK M. HARDENBROOK,

Judge.

Sol. for Complt.

District Court of the United States. District of New Jersey.

ROMAN CATHOLIC CHURCH OF SAINT
ANTHONY OF PADUA,
Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY,
Defendant.

In Equity.

**Order Denying Motion for Leave to Amend Bill
of Complaint.**

(*Filed July 22, 1912.*)

This cause having been brought to hearing upon the pleadings and proofs therein and before the opening of said hearing the counsel for complainant having moved the court for leave to amend the bill of complaint herein as to the location of the defendant's railroad not being upon Sixth street as appears by the proofs instead of upon Sixth street as alleged in the said bill.

It is, on this 22d day of July, nineteen hundred and twelve,

Ordered, that the said motion to amend the said bill in such particular, be and the same hereby is denied.

JOHN RELLSTAB.
Judge.

No objection as to form.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

District Court of the United States. District of New Jersey.

THE ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA, JERSEY CITY,
Complainant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY,
Defendant.

}

Objection to Form of Proposed Decree.

(*Filed February 15, 1913.*)

The above named complainant hereby protests against and objects to the form of the decree proposed by the defendant, on the ground that in said decree there is embodied three distinct findings of fact which should be admitted.

1st. Because Equity Rule No. 71 does not permit such findings to be recited or contained in the decree.

2nd. That there is nothing in the records of the Court to show that the Court dismissed the complainant's bill of complaint, upon the specific grounds recited in said decree or upon either of said grounds.

FRANK M. HARDENBROOK,
Solicitor for Complainant.

Copy of above received.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.



**Record Showing Movement of East and West-bound Trains over Harbinus Gorge Branch,
January, 1909, to May, 1910.**

Month	Outbound	Inbound	Outbound						Outbound	Inbound
			1909	1910	1909	1910	1909	1910		
January	Outbound	Inbound	672	697	1100	1099	400	400	671	696
	Outbound	Inbound	695	696	1098	1099	401	400	697	696
	Total		1367	1393	2198	2198	801	800	1378	1392
February	Outbound	Inbound	680	699	402	401	400	400	681	699
	Outbound	Inbound	693	699	400	401	400	400	677	694
	Total		1373	1398	802	802	800	800	1378	1393
March	Outbound	Inbound	1109	1177	1100	1101	1101	1101	1109	1177
	Outbound	Inbound	697	1097	1099	1099	1101	1101	1101	1099
	Total		1706	2274	2199	2199	2202	2202	2200	2276
April	Outbound	Inbound	1099	1116	1147	1147	1149	1149	1099	1116
	Outbound	Inbound	697	1091	1147	1147	1149	1149	1099	1100
	Total		1796	2216	2294	2294	2298	2298	2297	2296
May	Outbound	Inbound	1147	1159	1149	1149	1149	1149	1149	1159
	Outbound	Inbound	1184	1199	1199	1199	1199	1199	1184	1199
	Total		2331	2358	2348	2348	2349	2349	2337	2358
June	Outbound	Inbound	1120	1152	1149	1149	1149	1149	1120	1152
	Outbound	Inbound	1149	1169	1171	1171	1171	1171	1149	1151
	Total		2269	2321	2320	2320	2349	2349	2348	2351
July	Outbound	Inbound	1119	1121	1149	1149	1149	1149	1119	1121
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2267	2270	2320	2320	2349	2349	2347	2350
August	Outbound	Inbound	1147	1159	1149	1149	1149	1149	1147	1159
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2296	2297	2321	2321	2349	2349	2348	2350
September	Outbound	Inbound	1171	1159	1149	1149	1149	1149	1171	1159
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2320	2358	2348	2348	2349	2349	2348	2358
October	Outbound	Inbound	1159	1149	1149	1149	1149	1149	1159	1149
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2298	2299	2321	2321	2349	2349	2348	2349
November	Outbound	Inbound	1149	1149	1149	1149	1149	1149	1149	1149
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2296	2297	2321	2321	2349	2349	2348	2349
December	Outbound	Inbound	1177	1159	1149	1149	1149	1149	1177	1159
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2326	2358	2348	2348	2349	2349	2348	2358
January	Outbound	Inbound	1177	1159	1149	1149	1149	1149	1177	1159
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2325	2357	2348	2348	2349	2349	2348	2357
February	Outbound	Inbound	1177	1159	1149	1149	1149	1149	1177	1159
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2324	2357	2348	2348	2349	2349	2348	2357
March	Outbound	Inbound	1149	1149	1149	1149	1149	1149	1149	1149
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2296	2297	2321	2321	2349	2349	2348	2349
April	Outbound	Inbound	1149	1149	1149	1149	1149	1149	1149	1149
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2296	2297	2321	2321	2349	2349	2348	2349
May	Outbound	Inbound	1149	1149	1149	1149	1149	1149	1149	1149
	Outbound	Inbound	1149	1149	1171	1171	1171	1171	1149	1149
	Total		2296	2297	2321	2321	2349	2349	2348	2349

Done, C. S.

David McLean Esq. at 61 St. N.
General Consul of Canada
at San Antonio, Texas
F. W. ...

Done David McLean, Esq., 1910.

This instrument was made the eighth day of April, in the year of our Lord one thousand nine hundred and ten, by David McLean
Esq. 1910.

McLaughlin and Theresa L. McLaughlin his wife of the city of Jersey City in the County of Hudson and State of New Jersey parties of the first part, *and* the Roman Catholic Church of Saint Padua, a religious corporation of the State of New Jersey party of the second part;

Witnesseth; That the said parties of the first part for and in consideration of Sixteen hundred dollars lawful money of the United States of America to them in hand well and truly paid by the said party of the second part at or before the sealing and
10 delivery of these presents the receipt whereof is hereby acknowledged and the said parties of the first part being therewith fully satisfied Contented and paid have given granted bargained sold aliened released enfeoffed conveyed and confirmed and by these presents do give grant bargain sell alien release enfeoff convey and confirm unto the said party of the second part its successors and assigns forever. *All* that certain lot, tract or parcel of land and premises hereinafter particularly described situate lying and being in the City of Jersey City in the County of Hudson and State of New Jersey which on a Map entitled "Map of that part
20 of the Town of Jersey Commonly Called Aharsimus" made by Joseph F. Mangin and filed in the Clerk's Office of the County of Bergen A. D. 1804 is known and distinguished as lot number Ten (10) in Block Numbered Two hundred and fifty (250) and which said lot is numbered Ten (10) in Block numbered Three hundred and ninety (390) on Bacots Map of Jersey City made in 1861 and which said map was filed in the office of the Clerk now Register of the said County of Hudson. Said lot being twenty-five feet wide in front and rear and one hundred feet (100) deep throughout. *And* being the same premises conveyed
30 by William W. Carson and others to Dennis McLaughlin and John M. Shannon by deed dated May 19, 1884 and recorded in the office of the Register of the County of Hudson in Liber 391, page 373, and also conveyed by said John M. Shannon et ux to Dennis McLaughlin by deed dated June 2, 1884 and recorded in the office of the Register of the County of Hudson Liber 391 of Deeds page 376 etc.

Together with all and singular the houses buildings trees, ways, waters profits privileges and advantages with the appurtenances to the same belonging or in anywise appertaining.

40 Also all the estate right title interest property claim and demand whatsoever of the said parties of the first part of in and to the same and of in and to every part and parcel thereof.

To have and to hold all and singular the above described land and premises with the appurtenances unto the said party of the

second part its successors and assigns to the only proper use benefit and behoof of the said party of the second part its successors and assigns forever.

And the said Dennis McLaughlin does for himself his heirs executors and administrators covenant and agree to and with the said party of the second part its successors and assigns that he the said Dennis McLaughlin is the true lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof with the appurtenances thereunto belonging and that the said land and premises or any part thereof at the time of the sealing and delivery of these presents are not encumbered by any mortgage judgment or limitation or by any encumbrance whatsoever by which the title of the said party of the second part hereby made or intended to be made for the above described land and premises can or may be changed charged altered or defeated in any way whatsoever.

And also that the said parties of the first part now have good right full power and lawful authority to grant bargain sell and convey the said land and premises in manner aforesaid.

20

And also that the said Dennis McLaughlin will warrant secure and forever defend the said land and premises unto the said party of the second part its successors and assigns forever against the lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

DENNIS McLAUGHLIN (SEAL)
THERESA L. McLAUGHLIN (SEAL)

30

Signed sealed and delivered in the presence of

JAMES J. McLAUGHLIN,
Commissioner of Deeds, Jersey City, N. J.
April 8/02.

STATE OF NEW JERSEY, }ss:
County of Hudson,

Be It Remembered that on this eighth day of April in the year of our Lord one thousand nine hundred and two before me the subscriber personally appeared Dennis McLaughlin and Theresa L. McLaughlin who I am satisfied are the grantors mentioned in the within Indenture to whom I first made known the con-

40

tents thereof and thereupon they acknowledged that they signed sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. *And* the said Theresa L. McLaughlin being by me privately examined separate and apart from her said husband further acknowledged that she signed sealed and delivered the same as her voluntary act and deed *freely* without any fear threats or compulsion of her said husband.

JAMES J. McLAUGHLIN,

10 *Commissioner of Deeds, Jersey City, N. J., April 8/02.*

Recd. in the office and recorded Aug. 14th, 1902, 9:05 A. M.
No. 4352.

STATE OF NEW JERSEY, }
County of Hudson. }ss:

I JOHN McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Deed as the same is on Record in my Office in Book 817 of Deeds, on page 263, &c.

20 IN TESTIMONY WHEREOF, I have hereunto set my hand and
[L. S.] seal this 11th day of July, A. D., 1911.

JOHN J. McMAHON,
Register.

by C. M. AUSTIN,
Deputy Register.

Deed, C 18.

30 Block No. 1091.

DENNIS McLAUGHLIN ET UX TO
ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUE JERSEY
CITY. } Deed Dated May 10, 1893.

This Indenture made the Tenth day of May in the year one thousand eight hundred and ninety three Between Dennis McLaughlin and Tresa L. his wife of Jersey City New Jersey of the first part and the Roman Catholic Church of St Anthony of Padue Jersey City of the second part.

40 Witnessesthat the said party of the first part for and in consideration of the sum of Fifteen hundred dollars lawful money of the United States of America to them in hand paid by the said party of the second part at or before the ensealing and

delivery of these presents the receipt whereof is hereby acknowledged and the said party of the second part its successors for ever release and discharged from the same by these presents have granted bargained sold aliened remised released conveyed and confirmed and by these presents do grant bargain sell alien remise release convey and confirm unto the said party of the second part and to its successors and assigns for ever.

All that lot of land and premises situate lying and being in Jersey City in the County of Hudson and State of New Jersey which on a map of the Town of Aharsimus made by Joseph F. 10 Mangin filed in the Clerk's office of the County of Bergen 1804 is known as lot number nine (9) in block Two hundred and fifty (250) now City Block Three hundred and ninety (390), and which may be more particularly described as follows. Beginning at a point on the northerly side of Sixth Street distant one hundred feet westerly from the northwesterly corner of Sixth and Monmouth Streets running thence northerly parallel with Monmouth Street one hundred (100) feet thence westerly parallel with Sixth Street Twenty five (25) feet thence southerly parallel with Monmouth Street one hundred (100) feet to the northerly 20 side of Sixth Street thence easterly along the northerly side of Sixth Street twenty five (25) feet to the point or place of beginning. Being part of the same premises which were conveyed by William W. Carson to Dennis McLaughlin and John M. Shannon by deed dated May 19, 1884 recorded in Liber 391 of deeds for Hudson County on page 373 &c and whereof said John M. Shannon and wife conveyed and undivided one half part to said Dennis McLaughlin by deed dated June 2, 1884 recorded in Liber 391 of deeds for Hudson County on page 376 &c.

Together with all and singular the tenements hereditaments 30 and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof.

And also all the estate right title interest dower right of dower property possession claim and demand whatsoever as well in law as in equity of the said parties of the first part of in and to the same and every part and parcel thereof with the appurtenances.

To have and to hold the above granted bargained and described premises with the appurtenances unto the said party of the second 40 part its successors and assigns to their own proper use benefit and behoof for ever.

And the said Dennis McLaughlin for himself his heirs executors and administrators doth covenant grant and agree to and with the said party of the second part its successors and assigns that the said Dennis McLaughlin at the time of the sealing and delivery of these presents is lawfully seized in his own right of a good absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted bargained and described premises with the appurtenances and hath good right full power and lawful authority to grant, bargain sell and convey
10 the same in manner and form aforesaid.

And that the said party of the second part its successors and assigns shall and may at all times hereafter peaceably and quietly have hold use occupy possess and enjoy the above granted premises and every part and parcel thereof with the appurtenances without any let suit trouble molestation eviction or disturbance of the said party of the first part their heirs or assigns or of any other person or persons lawfully claiming or to claim the same.

And that the same now are free clear discharged and unencumbered of and from all former and other grants titles charges estates judgments taxes assessments and incumbrances of what nature and kind soever.
20

And also that the said parties of the first part and their heirs and all and every other person or persons whomsoever lawfully or equitably deriving any estate right title or interest of in or to the herein before granted premises by from under or in trust for them shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part its successors and assigns make do and execute or cause or procure to be made done or executed all and every such further and other lawful and reasonable acts conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part its successors and assigns for ever as by the said party of the second part its successors or assigns or their counsel learned in the law shall be reasonably devised advised or required.
30

And the said Dennis McLaughlin and his heirs the above described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said party of the second part its successors and assigns against the said parties of the first part and their heirs and against all and every person or persons whomsoever lawfully claiming or to
40

claim the same shall and will warrant and by these presents forever defend.

In Witness Whereof the said parties of the first part to these presents have hereunto set their hands and seals the day and year first above written.

Signed Sealed and Delivered in the presence of

DENNIS McLAUGHLIN [SEAL]

TRESA L. McLAUGHLIN [SEAL]

Words "heirs executors and administrators" where referring to party of 2nd part stricken out before execution.

10

KENT K. STEARNS.

STATE OF NEW JERSEY, }
County of Hudson, } ss.

Be it Remembered That on this Eleventh day of May in the year of our *Lord* One thousand eight hundred and ninety three before me the subscriber a Master in Chancery of New Jersey personally appeared Dennis McLaughlin and Tresa L. his wife who I am satisfied are the grantors in the within Indenture named and I having first made known to them the contents thereof they did thereupon each acknowledge that they signed sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. And the said Tresa L. McLaughlin upon a private examination apart from her said husband did further acknowledge that she signed sealed and delivered the same as her voluntary act and deed freely and without any fear threats or compulsion of her said husband. All of which is hereby certified.

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KENT K. STEARNS

Master in Chancery of N. J.

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Rec'd in the office and Recorded May 23d 1893 at 9 A. M.
No. 2203.

STATE OF NEW JERSEY, }
County of Hudson, } ss.

I JOHN J. McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Deed as the same is on Record in my Office in Book 577 of Deeds on page 81 &c.

In Testimony Whereof, I have hereunto set my hand and seal this 11th day of July A. D., 1911.

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[L. S.]

JOHN J. McMAHON,

Register.

By C. M. AUSTIN,

Deputy Register.

Deed. C 19.

FRANK J. MATHEWS ET UX TO
 ROMAN CATHOLIC CHURCH
 OF ST. ANTHONY OF PADUA. } Deed Dated June 11, 1898.

THIS INDENTURE made the eleventh day of June in the year one thousand eight hundred and ninety-eight between Frank J. Mathews of Jersey City, Hudson County, State of New Jersey 10 and Eugenie S. his wife party of the first part and the Roman Catholic Church of St. Anthony of Padue a corporation of the State of New Jersey party of the second part.

Witness that the said party of the first part for and in consideration of the sum of Five thousand (5000) dollars lawful money of the United States of America to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged from the same by these presents have 20 granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and to its successors and assigns forever.

All those four certain lots, pieces or parcels of land and premises situate, lying and being in Jersey City in the County of Hudson and State of New Jersey known and designated on a map of lots or parcels of land in Jersey City showing the partition of the same among the heirs of John B. Coles, deceased made by Robert C. Bacot Stephen Garretson and Charles 30 G. Sisson Commissioners filed in the office of the Clerk (now Register) of the said County of Hudson October 24th 1861 as lots numbered (17) eighteen (18) nineteen (19) and twenty (20) in block numbered two hundred and fifty (250) said lots taken together being bounded and described as follows:—

Beginning at a point formed by the intersection of the easterly line of Brunswick Street with the northerly line of Sixth (6) Street thence running northerly along the said easterly line of Brunswick Street one hundred (100) feet; thence easterly and parallel with Sixth (6) Street one hundred (100) feet; thence southerly and parallel with Brunswick Street one hundred (100) feet to the northerly line of Sixth (6) Street; thence westerly along the said northerly line of Sixth (6) Street one hundred (100) feet to the point or place of beginning.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders, rents issues and profits thereof.

And also all the estate, right, title, interest, dower right of dower, property, possession claim and demand whatsoever as well in law as in equity of the said party of the first part of in and to the same and every part and parcel thereof, with the appurtenances.

To have and to hold the above granted, bargained and described premises with the appurtenances unto the said party of the second part its successors and assigns to it and their own proper use, benefit and behoof forever. 10

And the said Frank J. Mathews for himself his executors, administrators and assigns doth covenant, grant and agree to and with the said party of the second part its successors and assigns that the said Frank J. Mathews at the time of the sealing and delivery of these presents is lawfully seized in his own right of a good absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted bargained and described premises with the appurtenances and hath good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid. 20

And that the said party of the second part its successors and assigns shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises and every part and parcel thereof with the appurtenances without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part their heirs or assigns or of any other person or persons lawfully claiming or to claim the same. And that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates judgments, taxes, assessments and encumbrances of what nature or kind soever. 30

And also that the said party of the first part and their heirs and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of in or to the herein before granted premises by from under or in trust for him or them shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part its successors and assigns make do and execute or cause or procure to be made, done and executed all and every such further and other lawful 40

and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part its successors and assigns forever as by the said party of the second part its successors or assigns or it or their counsel learned in the law shall be reasonably devised advised or required.

And the said Frank J. Mathews for his heirs the above described and hereby granted and released premises and every 10 part and parcel thereof with the appurtenances unto the said party of the second part its successors and assigns against the said party of the first part and his heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In Witness Whereof, the said party of the first part have hereunto set their hands and seals the day and year first above written.

FRANK J. MATHEWS (SEAL)

EUGENIE S. MATHEWS (SEAL)

Signed, sealed and delivered in the presence of

WILLIAM H. BROWN.

STATE OF NEW JERSEY, } ss:
Hudson County,

Be it remembered that on this 15th day of July in the year one thousand eight hundred and ninety eight before me William H. Brown a Commissioner of Deeds for New Jersey personally appeared Frank J. Mathews and Eugenie S. Mathews his wife who I am satisfied are the grantors in the within Indenture named and I having first made known to them the contents thereof they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

And the said Eugenie S. Mathews being by me privately examined separate and apart from her said husband did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed freely and without fear, threats or compulsion of or from her said husband.

WILLIAM H. BROWN,
Commissioner of Deeds for New Jersey.

Rec'd. in the office and recorded August 31-1900 at 3:15 P.M. No. 3979.

STATE OF NEW JERSEY, }
 County of Hudson, } ss:

I JOHN J. McMAHON, Register of the County of Hudson,
 do hereby Certify that the foregoing is a true and correct copy
 of a certain Deed as the same is on Record in my Office in Book
 755 of Deeds on page 427 &c.

IN TESTIMONY WHEREOF, I have hereunto set my hand and
 [L. S.] seal this 11th day of July, A. D., 1911.

JOHN J. McMAHON,

Register. 10

by C. M. AUSTIN,

Deputy Register.

Certificate of Incorporation of the Roman Catholic Church of St. Anthony of Padua, Jersey City.

NEW JERSEY, } ss.
 Hudson County.

Whereas in pursuance of an Act of the Legislature of the State
 of New Jersey Approved April Ninth A. D. Eighteen hundred 20
 and seventy-five entitled "An Act to Incorporate Trustees of Re-
 ligious Societies" The Right Reverend Winand Michael Wigger
 Roman Catholic Bishop of the Diocese of Newark and the Rev-
 erend Ignatius Barszoz now being The Pastor of the Roman
 Catholic Church now known as the Roman Catholic Church of
 St. Anthony of Padua Jersey City in the, in said County have
 elected Leon Jackowski and Jacob Jackowski two lay members of
 said Church according to the provisions of said Act and for the
 purpose of incorporating said Church. Now therefore we the
 said Winand Michael Wigger Bishop as aforesaid, the said Ig- 30
 natius Barszoz Pastor as aforesaid and Leon Jackowski and
 Jacob Jackowski the lay members aforesaid do further in pursu-
 ance of the provisions of said Act and for the purpose aforesaid
 hereby certify that the name by which we and our successors shall
 be known and distinguished as a body corporate is the "The
 Roman Catholic Church of St. Anthony of Padua Jersey City."

Witness our hands this sixteenth day of December in the year
 of our Lord one thousand eight hundred and eighty four.

WINAND MICHAEL WIGGER, *Bishop* 40
 REV. IGNATIUS, *Pastor Barszoz*
 JACOB JACKOWSKI, }
 LEON JACKOWSKI } *Lay Trustees*

Recorded Dec. 17, 1884.

H. K. VAN HORN,

STATE OF NEW JERSEY, }
 Hudson County, } ss.

I, JOHN F. CROSBY, Clerk of the County of Hudson aforesaid, and also Clerk of the Circuit Court and Court of the Common Pleas, holden therein, do hereby certify, that the foregoing is a true and correct copy of a certain certificate of the Roman Catholic Church of St. Anthony of Padua Jersey City as the same is taken from and compared with the original as recorded in my office, in Liber 4, Page 345 of Clerk's Record of Certificates of
10 Incorporation.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Courts and County at Jersey City, this Tenth day of July 1911.

[L. S.]

JOHN F. CROSBY,

Clerk.

Award and Report as to Lands under water in Harsimus Cove, D I.

In the matter of Commissioners for determining the compensation the State ought to receive for certain lands under water in Harsimus Cove, Jersey City, from the grantees thereof.

Whereas, by an act of the legislature of New Jersey passed

March 30, 1868, entitled "An act to enable the United Rail Road and Canal Companies to increase their depot and terminal facilities at Jersey City" certain lands were granted to the Delaware and Raritan Canal Company, the Camden and Amboy Rail Road and Transportation Company and the New Jersey Rail Road and Transportation Company, called therein the United Companies;

which lands are situated in Harsimus Cove, Jersey City in Hudson County in this State, and are in and by said act granted on certain terms and conditions therein expressed, amongst other things on the terms following, which are contained in the third section of the said act, that is to say. That the said United Companies shall pay to the treasurer of the State, on or before the first day of

January next, such sum or sums of money as shall be fixed, adjudged and determined as the just and equitable compensation the state ought to receive for the lands surrounding the Budd Grant,

hereby granted as aforesaid, by the Attorney General, and Three Commissioners, to be appointed by the Supreme Court on the application of the Attorney General of the State or the said companies, on such notice as the Court shall esteem reasonable, And

Whereas, George M. Robeson is the Attorney General of the State of New Jersey, and Daniel Haines, Charles S. Olden, and

Charles E. Elmer have been duly appointed such Commissioners under the authority and for the purposes aforesaid by the Supreme Court of New Jersey, And Whereas in and by the said act

of the Legislature of New Jersey it is provided that "the said Commissioners shall first take and file an oath in the Office of the Secretary of State, well, truly and faithfully to perform the duties of their appointment, before entering upon said duties."

The undersigned being severally duly sworn upon their respective oaths do depose and say that they will well, truly and faithfully perform all the duties of their appointment as such Commissioners.

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Sworn & subscribed before me
at Trenton this tenth day of
November, A. D. Eighteen
hundred and sixty eight.

M. BEASLEY,
Ch. Jus.

Geo. M. ROBBINS.
Cas. S. OLIVE.

10 Sworn & subscribed before me
by C. E. Elmer this Eleventh
day of November, A. D.
1868.

M. BEASLEY,
Ch. Jus.

C. E. ELMER.

Sworn & subscribed before me
at Trenton, this 12th day of
November, A. D. Eighteen
hundred & sixty eight.

A. O. ZAEMER,

Chancellor.

DAN. H. WOODS.

20 "Filed & Recorded Nov. 11 & 12, 1868."

Report of the Commissioners for determining the Compensation
the State ought to receive for certain lands under water at
Harsimus Cove, Jersey City, from the Gratuities thereof.

Whereas by an act of the Legislature of the State of New
Jersey, passed the thirtieth day of March eighteen hundred and
Sixty-eight, and entitled "An act to enable the United Railroad
and Canal Companies to increase their depot and terminal facil-
30 ties at Jersey City," there was granted to the United Delaware
and Raritan Canal Company, Camden and Amboy Railroad and
Transportation Company, and New Jersey Railroad and Trans-
portation Company, (called in and set the United Railroad an/
Canal Companies) their successors and assigns, to hold in the
corporate name of the said New Jersey Railroad and Transpor-
tation Company or otherwise, the right and title of the State to
the land lying between high water mark on the west, the deep
water of the Hudson on the east, the corner of South Second
Street on the north, and the corner of South Seventh Street on
40 the South in Jersey City, excepting however the portion lying
within said boundaries of the lands granted to Nathanial Buell
his heirs and assigns, by an act of the Legislature passed Novem-
ber eight in the year eighteen hundred and thirty six entitled

"Be it enacted by the National Guard all the right and title of the State of New Jersey to a certain tract of land under water in the Musconetcong River in the County of Bergen and State of New Jersey," which said last mentioned tract are subject to the and last mentioned act the Guard Credit, and the parties within and before hereinabove recited agree hereby and (hereinafter) that whenever it is so provided, by and by the said last mentioned act of the legislature, that the said Guard Commission shall pay to the Treasurer of the State, on or before the first day of January next, and sum or sums of money as shall be then required and determined by the said and aforesaid commissioners the State right to assess for the sum aforesaid the Guard Credit Monthly granted as aforesaid by the Attorney General and State Commissioners, to be appointed by the Supreme Court on the application of the Attorney General of the State on the said commissaries, on such notice as the Court should assess reasonable, and that the said commissioners should then take and file on and in the Office of the Secretary of the State with full and authority to perform the duty of their appointment before entering upon and during, and that the Attorney General and the said Commissioners should have regard to the convenience of the said date of the Guard Credit by the said commissioners, in the payment of the Credit, the situation of the land, and the inconvenience that the State should hold out to the payment for making the improvement, and George M. Dickerson being the Attorney General of the State of New Jersey, and Charles S. Glass, Mayor of Hoboken and Charles E. Elmer having been on the application of the said commissioners, duly appointed commissioners by the Supreme Court of the State of New Jersey and pursuant to the provisions of the act of the legislature for above aforesaid....

Now we the aforesaid being the Attorney General of the State of New Jersey, and the three Commissioners aforesaid, having first respectively taken an oath with 400, and thereafter to perform the duty of our appointment, and they do now in the Office of the Secretary of the State, before entering upon and during, and having due payment to make given to himself of said commissioners, on the twentieth day of December last at twelve noon in the City of Jersey City and have and have agreed to the appointment of Charles S. Glass, Chairman and Charles Elmer, Secretary, and to the payment of the amount of the said commissioners and of the amount appearing on the part of the State of New Jersey as the request of the Attorney General having been and been and at the various times and places at which on

met pursuant to adjournments made, from time to time between the said twelfth day of November last and the day of the date hereof; upon which day we not meet pursuant to the last adjournment, proceeded to inquire concerning the matter given us in charge as aforesaid, and having viewed the property granted, investigated the nature and condition thereof, and of the various rights claimed therein, and having considered the same, and the statements of the parties interested, and of the engineers and scientific persons and others having knowledge of the subject matter, and the arguments of counsel made on behalf of said United Companies, and others claiming to be interested, and on behalf of the State of New Jersey, and having regard to the ownership of the said part of the Budd Grant by the said companies, to the purpose of the Grant, the situation of the land, and the inducements that the State should hold out to the grantee for making the improvement, do fix, adjudge and determine the sum of Five hundred thousand dollars as the just and equitable compensation the State ought to receive for the lands surrounding the Budd Grant, in and by the said first mentioned act of the legislature granted as aforesaid.

Done at Trenton this Twenty-second day of December, A. D. eighteen hundred and sixty-eight.

GEO. M. ROBESON,

Attorney General of New Jersey.

CHS. S. OLDEN.

DANL. HAINES.

C. E. ELMER.

"Filed and Recorded Dec. 22, 1868."

STATE OF NEW JERSEY.

DEPARTMENT OF STATE.

I, S. D. DICKINSON, Secretary of State of the State of New Jersey, do hereby certify that the foregoing are true copies of the Award and Report, In the matter of Commissioners for determining the compensation the State ought to receive for certain lands under water in Harsimus Cove, Jersey City, from the grantees thereof, as the same are taken from and compared with the originals filed in this office November 11th and 12th, 1869, and December 22nd, 1868, and now remaining on file and of record therein.

40 In testimony whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Thirteenth day of September, A. D. 1911.

[Seal.]

S. D. DICKINSON,

Secretary of State.

**Lease New Jersey Railroad and Transportation Co.
to Pennsylvania Railroad Co. and Act validating
the same. D. 2.**

THIS INDENTURE, made this thirtieth day of June, in the year eighteen hundred and seventy-one, between THE DELAWARE AND RARITAN CANAL COMPANY, THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANY, and THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY, commonly called THE UNITED CANAL AND RAILROAD COMPANIES OF NEW JERSEY, corporations of the State of New Jersey aforesaid, and the PHILADELPHIA AND TRENTON RAILROAD COMPANY, a corporation of the State of Pennsylvania, parties of the first part, (hereinafter called the lessors,) for themselves, their successors and assigns, and THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the State of Pennsylvania, party of the second part, (hereinafter called the lessee,) for itself, its successors and assigns:

WHEREAS, The said lessors own a canal and railroads and other property, real and personal, that is to say, The Delaware and Raritan Canal Company own a canal, with its feeder and other appurtenances, which, crossing the State of New Jersey, connects the Delaware and Raritan Rivers; The Camden and Amboy Railroad and Transportation Company own a railroad from the River Delaware at Camden to the Raritan Bay, at South Amboy, in the said State of New Jersey, and also a steamboat line from the said South Amboy to the City of New York, and the Delaware and Raritan Canal Company and the Camden and Amboy Railroad and Transportation Company also jointly own a railroad from the City of New Brunswick, in the said State of New Jersey, to the river Delaware at the City of Trenton, in the said State, together with various branches; The New Jersey Railroad and Transportation Company own a railroad from the Hudson River, at Jersey City, to and through New Brunswick, in the said State of New Jersey; and The Philadelphia and Trenton Railroad Company own a railroad from and within the City of Philadelphia, in the said State of Pennsylvania to the Delaware River, opposite to the said City of Trenton, all of which will more fully appear by reference to the surveys of said works hereto annexed, together with rolling and floating stock for the operation of said railroads and canal;

AND WHEREAS, The said lessors own shares of stock, and estates and interests in other railroad companies, in horse or pas-

senger railway companies, in railroad and other bridges, in ferry companies and ferries, in turnpike companies and turnpikes, in plank road companies and a plank road, as lessees, stockholders, creditors and otherwise, and also cash and bills receivable, and other property, real and personal, in the said cities heretofore named and elsewhere, (a schedule of which, approximately correct, bearing even date herewith has been executed, and is hereto annexed ;)

AND WHEREAS, The said lessors are subject to certain debts,
10 contracts, obligations and guaranties, (schedules whereof, approximately correct, bearing even date herewith, have been executed, and are hereto annexed,) and are also parties litigant in certain suits now depending, both at law and in equity;

AND WHEREAS, It is expedient for the said United Companies that an agreement be entered into with The Pennsylvania Railroad Company aforesaid, (with which Company they are identified in interest and whose works form with their own continuous or connected lines) for the connection or consolidation of business;

20 AND WHEREAS, The works belonging to all the parties hereto can thereby be extended, improved and operated more profitably to the owners, and more advantageously to the public under one management;

And the said lessee has therefore agreed to lease the works, and all the property, real and personal, of the said lessors respectively, and to stand in their place and stead with reference to all the said contracts, debts, obligations, guaranties, and suits at law and in equity:

NOW THIS INDENTURE WITNESSETH, That the said lessors, for
30 and in consideration of the premises, and of the rents reserved, and the covenants and agreements on the part and behalf of the said lessee, to be by it kept and performed as hereinafter mentioned, have granted, demised and to farm-let, and by these presents do grant, demise, and to farm-let unto the said lessee, all and singular their canals, bridges, railroads with their appurtenances, and the floating stock, rolling stock, chattels, and other property, real and personal, of whatsoever kind and wheresoever situate, and all the franchises, rights and privileges of the said lessors thereto respectively belonging, or in anywise appertaining.

40 *Provided always, nevertheless,* and it is hereby expressly understood and agreed, that nothing herein contained shall be deemed or taken in any manner to affect the right of corporate existence of each of the lessors parties hereto, or such powers and fran-

chises of which the exercise may from time to time be necessary to protect the interest of their respective stockholders, according to the true intent and meaning of these presents;

TO HAVE AND TO HOLD the same unto the said lessee, for and during the full end and term of nine hundred and ninety-nine years, YIELDING AND PAYING therefor unto the said lessors yearly, and every year during the said term, the yearly rent or sum of one million nine hundred and forty-eight thousand five hundred dollars, lawful money of the United States, (the said rent being equal to ten dollars per share per annum upon the present aggregate outstanding capital stock of the said Companies lessors, to wit, one hundred and ninety-four thousand eight hundred and fifty shares, which said aggregate number of shares does not include seven thousand six hundred and fifty shares of the Philadelphia and Trenton Railroad Company owned by the Delaware and Raritan Canal Company and the Camden and Amboy Railroad and Transportation Company,) in equal quarter-yearly payments, on the first day of the months of July, October, January and April, in each and every year during the said term, the first and second quarterly payments thereof to be made together on 10 the first day of July, A D. 1871, free and clear of and from all taxes, charges and assessments whatsoever, now existing or hereafter to be imposed by lawful authority upon the said corporations lessors, their respective franchises and property, including all income tax of the United States, which said rent, when converted into dividends by the corporations lessors upon all the shares of their respective companies, [*excepting and excluding*, nevertheless, the said seven thousand six hundred and fifty shares of the Philadelphia and Trenton Railroad Company, owned by the Delaware and Raritan Canal Company and the Camden and 20 Amboy Railroad and Transportation Company as aforesaid.] shall be paid at some convenient place in the said City of Philadelphia, to be designated from time to time by the lessee, and to such depository of the lessors in the City of New York as may from time to time be designated by them or any of them, and also YIELDING AND PAYING the additional rent hereinafter covenanted to be paid according to the provisions and stipulations hereinafter particularly set forth in the Eighth Article of these presents.

And the said lessee doth hereby covenant and agree to and with the said lessors, and each of them, as follows:

First.—The said lessee shall and will yearly and in every year, during the said term, well and truly pay, or cause to be paid, unto the said lessors, the said yearly rent above reserved, on the days

and in the manner limited and prescribed as aforesaid, free and clear of and from all taxes, charges, impositions and assessments as is hereinbefore provided, and the said rent shall be so paid during the whole of the said term, notwithstanding any future action of any of the corporations, parties hereto, or of any majority of the respective stockholders thereof, as to and concerning any other matter herein contained; and in order to secure the individual interest of each stockholder of the lessors, in and to the said rent, the right is hereby given to each and every stockholder

10 to prosecute such suits as may be necessary in the premises to recover his proportionate part thereof, using, if needful, the name of the corporation in which he is a stockholder, and this provision may, if desired, be indorsed upon the certificates of stock issued by the corporations lessors.

Second.—The said lessee shall and will pay, satisfy and discharge all assessments, taxes, charges, transit duties, and impositions whatsoever, that shall or may be lawfully assessed, laid or imposed on the said lessors, or either of them, by any power or authority whatsoever during the said term, or on the franchises, 20 property, earnings, traffic and business of the said demised premises, or arising in any way therefrom, or to which the said lessors, or either of them, would have been subject if this lease had not been made, and they had respectively remained in possession of the demised premises, and operated their respective works.

Third.—The said lessee shall defend all actions of every kind that may or shall be depending against the said lessors, or either of them, or that may hereafter arise during the said term, and pay all amounts that shall or may be recovered against the said lessors, or either of them, and shall also indemnify and save 30 harmless the said lessors, and each and every of them, of and from all causes of action, legal and equitable, and claims and demands that have arisen, or shall or may arise against them, or either of them, or which shall or may arise against the said lessee, in the exercise of its powers under this lease and during the continuance thereof.

Fourth.—The said lessee shall, at all times during the said term, at its own expense, maintain and operate the canal and railroads and works hereby demised as the said lessors as the owners thereof or otherwise are now or may be required by law to do, 40 and shall keep up, maintain and operate the same as first-class works, in thorough repair, working order and condition, fully supplied with rolling and floating stock and equipment, at least equal to that now used and employed in operating the said works,

using the best and most suitable materials for renewals of the same as renewals shall become from time to time necessary, so that the traffic and business of the said demised premises shall be encouraged and developed, and full public accommodation given on reasonable terms; *provided, however,* that the lessee may sell or otherwise dispose of such of the floating stock as, in its judgment, may not be necessary or required for the purposes hereof.

Fifth.—The said lessee shall keep up the sinking funds of the said lessors, so far as the latter are by law or contract bound to do, and shall moreover pay all the debts and obligations of the 10 said lessors, or either of them as they shall become due.

Sixth.—The United Companies aforesaid, parties lessors hereto, shall, when and as their several loans shall respectively become due and payable, upon request deliver to the said lessee a corresponding amount of the bonds secured by the Indenture of Mortgage of the said lessors upon the main lines of their respective works in New Jersey, bearing date the 20th day of April, Anno Domini, 1871, with which to pay off and extinguish the said loans respectively; and if the avails of the bonds so secured by the said mortgage shall be greater than their par value, the excess shall 20 inure to the benefit of the lessee; but if they shall be insufficient for the purpose the deficiency shall be made good by the lessee. The difference between the aggregate amount needed for the payment, as aforesaid, of the said several loans and the amount of bonds authorized to be issued by the terms of the said mortgage, shall be delivered to and as required by the lessee, to be applied only to permanent additional improvements upon the property hereby demised.

Seventh.—The title to all canals and railroads hereafter to be acquired by the said lessee, to be worked and operated by it between Philadelphia and New York, and all new locations of the demised canal and railroads, with their improvements and appurtenances, shall be taken in the names of the said lessors, or some or one of them, that is to say, if in the said State of New Jersey and for railroad purposes, and in or north of the said City of New Brunswick, in the name of The New Jersey Railroad and Transportation Company; if for railroad purposes, and south of New Brunswick aforesaid, in the name of the Camden and Amboy Railroad and Transportation Company; if in the said State of Pennsylvania, in the name of the Philadelphia and Trenton 40 Railroad Company; and if for canal purposes, in the name of the Delaware and Raritan Canal Company. All such railroads and canals so hereafter to be acquired, shall be subject to this lease,

as if the same had originally passed hereby, except that no additional rent shall be paid therefor to the said lessors.

Eighth.—In order to aid in the development of the property known as Harsimus Cove, situate in Jersey City aforesaid, in such manner as the lessee shall deem suitable or expedient for its present or future business wants, the said United Companies lessors shall and will at the request of the lessee, issue and deliver to the latter, from time to time, shares of stock of their respective companies in seven instalments of three thousand shares, and one

10 instalment of fifteen hundred shares, in the proportion of their present respective capital stocks, *provided always, however,* that before the first of the said instalments shall be so issued and delivered, the sum of four hundred thousand dollars shall have been expended by the lessee in the development and improvement of the said property; and when and as often as an additional sum of four hundred thousand dollars shall have been so expended, the said United Companies lessors shall and will issue and deliver as aforesaid the other instalments of three thousand shares of such stock, respectively; and when the further sum of two hun-

20 dred thousand dollars shall have been so expended, the said United Companies lessors shall and will issue and deliver as aforesaid the final instalment of fifteen hundred shares of such stock; and when the whole of the said twenty-two thousand five hundred shares shall have been so issued, no further or additional stock of any of the corporations lessors shall thereafter be issued by them, and as often as the said instalments of three thousand shares and of fifteen hundred shares respectively shall be issued and delivered to the lessee, the latter shall and will, in consideration therefor, pay unto the said lessors yearly.

30 and every year during the said term, an additional rent or sum of thirty thousand dollars for each instalment of three thousand shares, and of fifteen thousand dollars for the final instalment of fifteen hundred shares, lawful money of the United States, in equal quarter-yearly payments, on the aforesaid first day of the months of July, October, January and April, in each and every year during the said term; the first quarterly payment thereof to be made on the first day of the quarter next succeeding the said issue and delivery of the said instalments of shares as aforesaid; the said rent to be also free and clear of and from **40** all taxes, charges and assessments whatsoever now existing or hereafter to be imposed, by lawful authority, upon the said corporations lessors, their respective franchises and property, including all income tax of the United States, which said ad-

ditional rent, when converted into dividends by the said United Companies lessors upon the said shares, shall also be paid at some convenient place in the said City of Philadelphia, to be designated, from time to time, by the lessee, and to such depository of the said lessors in the City of New York, as may, from time to time, be designated by them or any of them.

Ninth.—The said lessee assumes all the contracts, agreements, obligations, leases, guaranties and liabilities of the said lessors and each of them; and all the benefit to arise therefrom shall inure to the said lessee. No future merger or consolidation 10 between the said lessee and any corporation whose works have been leased to any of the said lessors, shall in the event of re-entry by the said lessors, as hereinafter provided, extinguish or impair the rights under the said leases, but the same shall be and remain in full force as though these presents had not been made.

Tenth.—To enable the said lessors to keep up and maintain their corporate organizations, the said lessee shall pay semi-annually, to the said lessors, on the first Tuesday of July and January in each year, the sum of five thousand dollars, the first semi-annual payment to be made on the first Tuesday of July, A. D. 20 1871, and shall and will defray the expense incident to the payment of said dividends in the City of Philadelphia, and provide suitable offices in the cities of Philadelphia, Trenton and New York, for the accommodation of the directors and officers of the said corporation lessors.

Eleventh.—Such real and personal property of the lessors, or either of them, as shall, in the opinion of the lessee, not be necessary for the use of the said canal or railroads, or for the protection of the interests of the said lessors therein, including the floating stock hereinbefore authorized to be sold or otherwise 30 disposed of, may with the consent of the lessors respectively, from time to time, be sold, and the said lessors, or either of them, shall unite in the execution of proper conveyances and assurances therefor, without liability on the part of the purchaser to see to the application of the purchase money. The proceeds of all such sales shall be applied, at the option of the lessee, either to the permanent reduction of the funded debts of the said lessors, or either of them, or to permanent additional improvements upon the property hereby demised.

Twelfth.—The accounts to be kept by the said lessee of the 40 works and property, which form the subjects of this lease and of the business thereof, shall at all reasonable hours and times be open to the inspection and examination of the President or

Presidents of the said lessors, and each of them, and of such other person or persons as the said lessors shall, from time to time, by resolution of their Directors, appoint to examine the same, and the said lessee shall, at its own proper cost, annually during the said term, furnish to the said lessors, on or before the first day of April in each year, a detailed statement of the earnings, income, receipts and expenditures of and from the said demised premises during the previous year, ending on the thirty-first day of December, and the said works and premises themselves shall also, in like manner, be open to inspection and examination as aforesaid.

Thirteenth.—In case the said lessee shall at any time during the said term omit to pay the rent, or fail to keep and perform the covenants and agreements hereinbefore mentioned and provided for, and shall continue in default in the premises for the period of ninety days, it shall be lawful for the said lessors, their successors and assigns, to enter into and upon the hereby demised premises, or such as may be then subsisting in their place and forming the subjects of this lease, and remove all persons therefrom, and from thenceforth to have, hold, possess and enjoy the same as of their first and former estate therein, and thereupon all the estate and interest of it, the said lessee, in and to the same shall absolutely cease and determine as though these presents had never been made. *Provided always, however,* and it is expressly understood and agreed, that the said rent shall, in such event, be apportioned from the time of the last preceding payment of any instalment thereof, to the time of such entry. *And provided further,* that such re-entry shall not in any manner affect any claim for damages against the said lessee, its successors and assigns, resulting from any breach of any of the covenants hereinbefore contained.

Fourteenth.—At the end of the said term or at the sooner determination of this lease, the said lessee, its successors and assigns, shall re-deliver and surrender up to the said lessors, their successors or assigns, the said several subjects of this lease, or such of them as shall then be subsisting in their place, in as good order and condition as the same now are, and with such additions, alterations and improvements, as shall have been made thereto.

Fifteenth.—The said lessors shall and will, from time to time and at all times hereafter, at the request and cost of the said lessee, make, execute and deliver all such other and further instruments and assurances in the law for the further, better, or

more perfectly assuring the premises hereby demised to the use and in manner aforesaid, according to the true intent and meaning of these presents, as by the said lessee, or its counsel learned in the law, shall be reasonably devised, advised or required.

Sixteenth.—Each and all of the preceding covenants, agreements and stipulations, shall mutually bind, and inure to the benefit of the said lessors and lessee, their and each of their successors and assigns.

In witness whereof, the said parties have hereunto respectively affixed their corporate seals, the day and year first above written. **10**

R. F. STOCKTON, [SEAL]
President of the D. & R. Canal Co.

Attest:

JOHN P. STOCKTON,
Sec'y.

WM. H. GATZMER, [SEAL]
*President C. & A. R. R. & Tr. Co.;
by order of the Board of Directors
of the United Companies.*

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Attest:

SAM'L J. BAYARD,
Secretary C. & A. R. R. & T. Co.

A. L. DENNIS, [SEAL]
President N. J. R. R. & T. Co.

Attest:

FRED. W. RANKIN,
Secretary.

WM. H. GATZMER, [SEAL] **30**
*President pro tempore P. & T. R.
R. Co.; by order of the Board of
Directors.*

Attest:

FLOYD H. WHITE,
Sec'y.

J. EDGAR THOMSON, [SEAL]
President Penn'a R. R. Co.

Attest:

JOS. LESLEY,
Sec'y.

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STATE OF NEW JERSEY, }
 COUNTY OF MERCER, } ss.

Be it remembered that on the Twenty-ninth day of November, Anno Domini one thousand eight hundred and seventy-one, before me, a Master in Chancery, personally appeared Robert F. Stockton, President of the Delaware and Raritan Canal Company, which Company I am satisfied is one of the grantors in the foregoing Indenture of Lease and Contract, and I having first made known to the said Robert F. Stockton the contents thereof, and the said Robert F. Stockton being by me duly sworn according to law, did depose, acknowledge and say: That he is the President of The Delaware and Raritan Canal Company; that, as such President, he did sign, seal and deliver the foregoing Indenture as the act and deed of the said Company; that the seal seal of The Delaware and Raritan Canal Company, and was thereto affixed by him, the said Robert F. Stockton, as President of the said Company, by the resolution and authority of the Directors of said Company.

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Sworn and subscribed before me, }
 at Trenton, the day and year }
 aforesaid.
 CHARLES E. GREEN,
Master of Chancery of N. J.

R. F. STOCKTON.

STATE OF NEW JERSEY, } ss.
 COUNTY OF MERCER,

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Before me, a Master in Chancery of said State, personally appeared John P. Stockton, who, by me being duly sworn according to law, deposes and says: That this deponent is the Secretary of The Delaware and Raritan Canal Company, a corporation in the State of New Jersey, and one of the parties of the first part in the foregoing Indenture of Lease and Contract named; that Robert F. Stockton is the President of the said Company; that the seal thereto affixed as the seal of the said Company is their corporate seal; that this deponent saw the said Robert F. Stockton, President of the said Company, sign, seal and deliver the foregoing Indenture as the voluntary act and deed of said Company, and was thereunto authorized by a resolution of the Board

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of Directors of said Company, and this deponent at the same time signed his name thereto as an attesting witness.

Subscribed and sworn before me,
at Trenton, N. J., this Twenty-
ninth day of November, Anno
Domini, 1871.
CHARLES E. GREEN,
Master in Chancery of N. J.

JOHN P. STOCKTON.

STATE OF NEW JERSEY,
COUNTY OF MERCER.

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Be it remembered that on the Twenty-ninth day of November, Anno Domini one thousand eight hundred and seventy-one, before me, a Master in Chancery, personally appeared William H. Gatzmer, President of the Camden and Amboy Railroad and Transportation Company, which Company I am satisfied is one of the grantors in the foregoing Indenture of Lease and Contract, and I having first made known to the said William H. Gatzmer the contents thereof, and the said William H. Gatzmer, being by me duly sworn according to law, did depose, acknowledge and say: That he is the President of the Camden and Amboy Railroad and Transportation Company; that as such President he did sign, seal and deliver the foregoing Indenture as the act and deed of the said Company; that the seal affixed thereto as the seal of the said Company is the corporate seal of The Camden and Amboy Railroad and Transportation Company, and was thereto affixed by him, the said William H. Gatzmer, as President of the said Company, by the resolution and authority of the Directors of said Company.

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Sworn and subscribed before me,
at Trenton, the day and year
aforesaid.
CHARLES E. GREEN,
Master in Chancery of N. J.

W.M. H. GATZMER.

STATE OF NEW JERSEY,
COUNTY OF MERCER.

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Before me, a Master in Chancery of said State, personally appeared Samuel J. Bayard, who by me being duly sworn according to law, deposes and says: That this deponent is the Secretary of

the Camden and Atlantic Railroad and Transportation Company, a corporation in the State of New Jersey, and one of the parties of the first part, in the foregoing Indenture of Lease and Conveyance, that William H. Gannett is the President of the said Company, that the seal thereto affixed is the seal of the said Company in their corporate seal; that the defendant was the said William H. Gannett, President of the said Company, signs, and did deliver the foregoing Indenture as the voluntary act and deed of the said Company, and was documents authorized by the resolution of the Board of Directors of the said Company, and the defendant at the same time signed his name thereto as an attesting witness.

Subscribed and sworn before me,

at Trenton, N. J., this Twenty-ninth day of November, anno Domini, A.D.

David S. Brown,

Chancery Clerk,
Master in Chancery of N. J.

28 State of New Jersey, vs.
Carteret et al.

Be it remembered, that on the Twenty-ninth day of November, anno Domini one thousand eight hundred and seventy-one, before me, a Master in Chancery, personally appeared Alfred L. Dennis, President of the New Jersey Railroad and Transportation Company, which Company I am satisfied is one of the grantees in the foregoing Indenture of Lease and Conveyance, and I having first made known to the said Alfred L. Dennis, the contents thereof, and the said Alfred L. Dennis being by me fully advised according to law, did depose, acknowledge and say: That he is the President of The New Jersey Railroad and Transportation Company; that as such President he did sign, and did deliver the foregoing Indenture as the seal and deed of the said Company; that the seal affixed thereto is the seal of the said Company in the corporate seal of The New Jersey Railroad and Transportation Company, and was documents affixed to him, the said Alfred L. Dennis, as President of the said Company, by the resolution and authority of the Directors of said Company.

A. L. Dennis

Sware and affirmed before me this day and year aforesaid.

Conrad E. Cross,
Master in Chancery of N. J.

Books on New Jersey
Books on Monmouth

Please see, at Boston in Gloucester and there personally
quarrel Frederick W. Bassett, also being the one who, according to him, helped and encouraged this Mr. Chapman to be
Secretary of the New Jersey Railroad and Transportation Company, a corporation in the State of New Jersey, and one of his
parties of the New York to the Rutgers Railroad of New Jersey
Company named. His office is, however, in the President of the
and Company. But he and Bassett, efficient as the one of the said
Company is their respective and that this Chapman and the said
office is, however, President of the said Company, can, and will
allow the Rutgers Railroad to the railroads are part of the
and Company, and was likewise authorized by a resolution of the Board of Directors of the said Company, and the
highest of the company against the same Bassett as an obstruc-
ing witness.

Subscribed and received without fee
at Worcester, by G. J. and F. W. Rogers,
with the rest of Worcester. Worcester,
Mass., 1851.

James H. Gray
University of Texas at S. A.

Sinella and *Streptomyces*

the uses and purposes therein mentioned, and that the name of this deponent subscribed to the said Indenture as President of the said corporation is of this deponent's own proper handwriting.

Sworn and subscribed before me,
this Thirtieth day of November,
Anno Domini, 1871.
W. W. DOUGHERTY,
[SEAL] Alderman.

Wm. H. GATZMER.

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STATE OF PENNSYLVANIA, {
CITY OF PHILADELPHIA. { ss.

Before me, an Alderman of the City of Philadelphia personally appeared Floyd H. White, who, by me being duly sworn according to law, did depose and say: That he is the Secretary of The Philadelphia and Trenton Railroad Company, a corporation of the State of Pennsylvania, and one of the parties of the first part in the foregoing Indenture of Lease and Contract named; that William H. Gatzmer is the President pro tem. of the said Company; that the seal thereto affixed as the seal of the said Company is their corporate seal; that the deponent saw the said William H. Gatzmer, President pro tem. of the said Company, sign, seal and deliver the foregoing Indenture, as the act and deed of the said Company, and was thereunto authorized by a resolution of the Board of Directors of the said Company, and this deponent at the same time signed his name thereto, in attestation thereof.

Subscribed and sworn before me,
this Thirtieth day of November, Anno Domini, 1871.
W. W. DOUGHERTY,
[SEAL] Alderman.

FLOYD H. WHITE.

STATE OF PENNSYLVANIA, } ss.
CITY OF PHILADELPHIA. }

Be it remembered that on the Thirtieth day of June, Anno Domini one thousand eight hundred and seventy-one, before me, a Notary Public for Philadelphia, personally appeared J. Edgar
40 Thomson, President of the Pennsylvania Railroad Company, who, being by me duly affirmed according to law, did depose and say: That he is the President of The Pennsylvania Railroad Company, and that he was personally present at the execution

of the above Indenture of Lease and Contract, and saw the corporate seal of the said The Pennsylvania Railroad Company duly affixed thereto, and that the seal so affixed thereto is the corporate seal of the said The Pennsylvania Railroad Company, and that the said Indenture was duly signed, sealed and delivered in pursuance of a resolution of the Board of Directors of the said Company, as and for the act and deed of the said Company for the uses and purposes therein mentioned, and that the name of this deponent subscribed to the said Indenture as President of the said corporation is of this deponent's own proper handwriting. 10

Affirmed and subscribed before
me, this Thirtieth day of June,
Anno Domini, 1871.
HENRY C. SPACKMAN,
[SEAL] Notary Public.

J. EDGAR THOMSON.

STATE OF PENNSYLVANIA, }
CITY OF PHILADELPHIA. } ss.

Before me, a Notary Public for the City of Philadelphia, personally appeared Joseph Lesley, who, by me being duly sworn according to law, did depose and say: That he is the Secretary of The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, party of the second part in the foregoing Indenture of Lease and Contract named; that J. Edgar Thomson is the President of the said Company; and that the seal thereto affixed as the seal of the said Company is their corporate seal; that the deponent saw the said J. Edgar Thomson, President of the said Company, sign, seal and deliver the foregoing Indenture as the act and deed of the said Company, and was thereunto authorized by a resolution of the Board of Directors of the said Company, and this deponent at the same time signed his name thereto, in attestation thereof. 30

Subscribed and sworn before
me, this Thirtieth day of
June, Anno Domini, 1871.
HENRY C. SPACKMAN,
[SEAL] Notary Public.

JOS. LESLEY.

New Jersey Laws of 1873. Page 1298.

CHAPTER CCCLXXXVI.

AN ACT to validate and confirm a certain Lease and Contract between the companies now known as "The United New Jersey Railroad and Canal Company," and "The Pennsylvania Railroad Company."

1. BE it ENACTED by the Senate and General Assembly of the
10 State of New Jersey, That the lease and contract, a copy of which is now on file in the office of the Secretary of State, dated the thirtieth day of June, one thousand eight hundred and seventy-one, between the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company, now merged into and known as "The United New Jersey Railroad and Canal Company," which companies, together with the Philadelphia and Trenton Railroad Company, are the lessors, and the Pennsylvania Railroad Company, which is the lessee, be and the
20 same is hereby validated, ratified and confirmed; *provided*, that nothing in this act shall be considered as a waiver of any rights that the State of New Jersey has in the corporations named in this act; nor in anywise affect or interfere with the rights of parties in any suit or suits in law or equity now pending in any of the courts of this State.

2. *And be it enacted*, That this act shall be deemed a public act, and shall take effect immediately.

Approved March 27, 1873.

- 30 *New Jersey Laws of 1868. Page 550.*

CHAPTER CCXLVIII.

AN ACT to enable the United Railroad and Canal Companies to increase their depot and terminal facilities at Jersey City.

- WHEREAS, The United Delaware and Raritan Canal Company, Camden and Amboy Railroad and Transportation Company, and New Jersey Railroad and Transportation Company require for the accommodation of their business, more room for
40 depot, storage, and other railroad and canal purposes at Jersey City, and to that end have purchased, in the name of the last mentioned company all private right, title, interest and property in the lands under water known as the Harsimus Cove property,

lying between the centres of South Second and South Seventh Streets, and extending from the upland or shore to the deep waters of the Hudson river; and whereas, by an act of the Legislature of this State, passed November eighth, in the year eighteen hundred and thirty-six, entitled "An act vesting in Nathaniel Budd all the right and title of the State of New Jersey to a certain tract of land under water in the Hudson river, in the County of Bergen and State of New Jersey," a considerable portion of said property was granted to one Nathaniel Budd, his heirs and assigns, whose title thereto has been derived to the said companies for their respective portions thereof; and whereas, the said parties desire to improve the said property for the purposes of their respective organizations; and whereas, it is intended that nothing in this preamble shall be considered as yielding any rights of the State to the lands under water embraced in the limits aforesaid, excepting always that part of the Budd grant south of South Second Street, purchased by said companies and such rights as legally follow the ownership of the up-land adjoining the water; therefore,

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1. BE IT ENACTED by the Senate and General Assembly of the State of New Jersey, That the right and title of the State to the land lying between high water mark on the west, the deep water of the Hudson on the east, the centre of South Second street on the north and the centre of South Seventh street on the south in Jersey City aforesaid, excepting thereout that portion of the Budd grant heretofore granted by the State and now owned by said companies, is granted to said united companies, their successors and assigns, to hold in the corporate name of the said New Jersey Railroad and Transportation Company, or otherwise, to have, hold, possess and enjoy, that portion of the said Harsimus Cove property so purchased by them as aforesaid, and such other property in Jersey City, excepting always, lands under water belonging to the State and not described in this bill, as the joint board of directors of said united companies may deem requisite and necessary for the transaction of their business; and that it shall be lawful for said united companies to fill up and improve the said property within the said limits between the centre lines of south Second and south Seventh streets as aforesaid, and erect thereon wharves, piers, canals, slips, store-houses, depots, and other buildings and shops, and car and engine houses and appendages, with power to extend their bulkheads, solid filling and piers to the exterior lines adopted for those purposes respectively by the commissioners appointed under the act

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approved April eleventh, in the year eighteen hundred and sixty-four, entitled, "An Act to ascertain the rights of the State and of the riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in the State," or to such other exterior lines as may hereafter be established by or under the authority of the legislature of this State, and that it shall be lawful for said united companies to lay out, construct and build a branch railroad not exceeding one hundred feet in width from the said property so purchased as aforesaid to some point in the

10 present line of the New Jersey railroad, in or eastward of the deep cut in Bergen Hill, with as many sets of tracks and rails as the said directors shall deem necessary, and with power to procure the right of way for such branch railroad either by purchase or by appraisement of commissioners in the manner prescribed in and by the original charter or act of incorporation of the said New Jersey Railroad and Transportation Company; and to make said branch railroad elevated, so as to pass above the streets of said city as least twelve feet in the clear above said streets; *provided also*, that nothing herein contained shall be construed to take away or interfere with any vested rights of

20 any other person or persons in the said property.

2. *And be it enacted*, That all streets projected or laid out or authorized to be laid out by any act of the legislature of this State, over the said property so purchased by the said united companies as aforesaid east of Prospect street, except such parts of any streets as are now actually filled in and used, shall be and are hereby vacated, and no street shall hereafter be laid out or opened thereon except by consent of said united companies; and that said united companies, their officers and agents shall have the supervision and control of the wharves, piers, canals, buildings and other improvements which they may erect upon the said property, and may charge such wharfage and other rates for the use thereof, as the said directors may deem reasonable, or as may be agreed upon with the parties desiring to use the same; and that all acts and parts of acts heretofore passed which limit the amount of land that may be held by the said united companies, or either of them, for the purposes of their charters respectively, or which subjects such lands, if exceeding a certain quantity, to any other tax than that which is imposed upon the said companies respectively by their respective charters or acts of incorporation, are hereby repealed; *provided, however*, that such parts of said property and the improvements to be made thereon as shall be used for other than railroad, canal, depot,

transhipping or landing purposes (but no other portions thereof) shall be subject to local and municipal taxation; *provided, further,* that the authorities of Jersey City shall continue to have the same right and power as they now have or as may hereafter be conferred upon them to construct necessary sewers through the property hereby granted to connect with and discharge the main sewers of said city between south Second street and south Seventh street; *and provided also,* that the said property hereby granted shall be subject to assessments for benefits arising from the construction of sewers, and from the improving of any streets 10 in the manner now provided for; *and provided further,* that nothing in this act shall be construed as exempting the before described property from the provisions of an act entitled "An Act for supplying Jersey City and places adjacent with pure and wholesome water," and supplements thereto; *and provided further,* that the said united companies shall on or before the first day of January next define the route of their tracks from the Bergen cut through Jersey City to the property hereinbefore described.

3. *And be it enacted,* That the said united companies shall pay 20 to the treasurer of the State, on or before the first day of January next, such sum or sums of money as shall be fixed, adjudged and determined as the just and equitable compensation the State ought to receive for the lands surrounding the Budd grant hereby granted as aforesaid, by the attorney general and three commissioners, to be appointed by the Supreme Court on the application of the attorney general of the State, or the said companies, on such notice as the court shall esteem reasonable; the said commissioners shall first take and file an oath in the office of the secretary of the State, well, truly and faithfully to perform 30 the duties of their appointment before entering upon said duties, and the attorney general and said commissioners having regard to the ownership of the said part of the Budd grant by the said company, to the purpose of the grant, the situation of the land, and the inducements that the State should hold out to the grantees for making the improvement; and until such consideration is paid it shall not be lawful for the said companies to improve, fill in, reclaim or enjoy the lands under water herein referred to (except the lands lying within the Budd grant); and as the purposes of this grant require that the exterior line of the lands hereby intended to be granted to and enjoyed by said companies should always adjoin and front the deep waters of the Hudson river, be it further enacted that the State of New 40

Jersey will not, without the consent of said companies, make any grant of the lands, or of any easements therein, which lie in front of the land hereby intended to be granted, and that this grant shall extend to the exterior lines fixed already by the commissioners by the act entitled "An Act to ascertain the rights of the State and of the riparian owners in the lands lying under the waters of the bay of New York, and elsewhere in the State," approved April eleventh, eighteen hundred and sixty-four, in their report and maps, and any further to the east to which said exterior lines may be extended hereafter by the State, and no further; *provided*, the said companies shall file their acceptance of the determination and judgment of the said commissioners in the office of the Secretary of State, and pay to the treasurer of this State the compensation fixed, adjudged and determined by the said commissioners on or before the first day of January next:

4 *And be it enacted*, That this act shall be deemed and taken as a public act and shall take effect immediately, and that all acts and parts of acts, either general or special, inconsistent with this act, be and the same are hereby repealed.

Passed March 30, 1868.

New Jersey Laws of 1832, Page 96.

AN ACT to incorporate "The New Jersey Railroad and Transportation Company."

Sec. 1. BE IT ENACTED by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, That John S. Darcy, William Chetwood, Isaac Baldwin, Abraham W. Kinney, Garrett Sip, William Edgar, Cornelius L. Harlenburg, Thomas Muir, William R. Allen, James C. Vandkyk, and their associates, shall be, and are hereby constituted, a body politic and corporate, by the name of "The New Jersey Railroad and Transportation Company," and by that name they and their successors shall be known in law, and have power to sue and be sued, and to defend and be defended, in all courts, whether in law or equity, and by that name shall be capable of purchasing, or of otherwise receiving and becoming possessed of, and holding or conveying any real or personal estate; shall have perpetual succession, and may also have a common seal, and alter or renew the same at pleasure; and shall have, enjoy and exercise all the rights, powers and privileges pertaining to corporate bodies, and necessary for the purposes of this act.

Sec. 2. *And be it enacted*, That the capital stock of the said corporation shall be seven hundred and fifty thousand dollars, with liberty for the company to increase the same to one million five hundred thousand dollars, and shall be divided into shares of fifty dollars each, which shall be deemed personal property, and transferable in such manner as the said corporation shall by their by-laws direct.

Sec. 3. *And be it enacted*, That the above named persons, together with William Pennington, Zephaniah Drake, Amzi Dodd, Jacob K. Mead, Thomas Salter, Ashbel W. Cory, Joseph 10 W. Scott, and James S. Nevius, shall be commissioners to open books for receiving subscriptions to the capital stock of the said corporation; the said books shall be opened by the said commissioners, or a majority of them, three days in succession, the first day at New Brunswick, the next day at Elizabeth-town, and the third at Newark, and shall be kept open from ten o'clock in the morning till five o'clock in the afternoon, each day; and twenty days' notice shall be given by said commissioners, of such times and places, in two of the newspapers printed in Newark and New Brunswick, and one printed in Elizabeth-town and Ral- 20 way; and if more subscriptions be taken than the amount of the capital stock, it shall be the duty of the commissioners by whom the said books are opened, or a majority of them, to make a fair and just apportionment of the stock among the subscribers, giving a preference to the citizens of New Jersey; and at the time of subscribing for said stock, five dollars shall be paid upon each share subscribed for, to the commissioners, or some one of them; and that the residue of the subscription shall be paid in such instalments, and at such times and places, and to such persons, as the president and directors of the company shall from time 20 to time direct, by giving thirty days' public notice thereof, as aforesaid; and upon failure of payment thereof, as so directed, the said president and directors shall have power to forfeit the shares of each and every person so failing to pay said instalments, or any of them, to and for the use of the company.

Sec. 4. *And be it enacted*, That when the said capital stock shall be subscribed for, and the books closed, and the apportionment made, if the same be necessary, it shall be the duty of the aforesaid commissioners, or a majority of them, to give a like notice as above, to choose nine directors; and such election shall 40 be made at the time and place appointed, by such of the stock-holders as shall attend for that purpose, either in person or by lawful proxy, each share entitling the holder thereof to one vote;

and the said commissioners, or any two of them, shall be inspectors of the first election of directors of said corporation, and shall certify, under their hands, the names of those persons duly elected; and deliver over the subscription books to said directors, and the moneys paid to them for subscriptions to said capital stock, as shall remain in their hands, after defraying the expenses of subscription and incidental expenses; and that annually thereafter, upon like notice being given by the directors for the time being, the stockholders shall, in the same manner,
10 elect the same number of directors; and the time and place of holding the first meeting of directors shall be fixed by the said persons who act as inspectors aforesaid; and the first directors, and yearly, the directors chosen at any election for that purpose, shall, as soon as may be after the election, choose out of their own number a president; and in case of the death, resignation or removal of the president or any director, such vacancy or vacancies may be filled for the remainder of the year wherein they may happen, by the board of directors; and in case of the absence of the president, the said board, or a majority of them,
20 may appoint a president, *pro tempore*.

Sec. 5. *And be it enacted*, That five directors of said corporation shall form a board, and they, or a majority of them, shall be competent to transact the business of the said corporation, and may have power to call in the remainder of the capital stock of the said corporation by such instalments, not exceeding five dollars on each share at any one time, and at such times as they may direct: *Provided*, that such instalments be not required at shorter periods than thirty days from each other; and to make and prescribe such by-laws, rules and regulations as to them shall appear needful and proper, touching the management and regulation of the stock, property, estate, and effects of the said corporation; and shall also have power to appoint a secretary, treasurer, engineer, agents, superintendents and servants as may be required to transact the business of the corporation, with such compensation to them and the president, as to the board shall seem proper; and that they shall require from the treasurer such security as they may deem sufficient for the due performance of his trust, and generally do all other acts and things they may deem expedient, for the purpose of carrying into effect the objects contemplated by this incorporation.
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Sec. 6. *And be it enacted*, That the said president and directors of the said corporation shall be, and they are hereby invested with all the rights and powers necessary to the survey, laying

out, and construction and repair or a rail road, not exceeding sixty-five feet in width, with as many sets of tracks as they may deem necessary from such convenient point in the city of New Brunswick, to be determined on by said company, by and with the consent of the corporation of said city, through or near the villages of Rahway and Woodbridge, and within one half mile of the market-house of Elizabethtown, and through Newark, by the most practicable route; and thence contiguous to, or south of, the bridges crossing the Hackensack and Passaic Rivers, crossing Bergen Ridge south of the turnpike road, to some 10 convenient point, not less than fifty feet from high water mark on the Hudson River, opposite to the city of New York; *Provided always*, that it shall be lawful for the said company to make any branch rail road to any ferry on the Hudson river, opposite to the city of New York aforesaid, to which the main line of said road shall not be located, which branch shall intersect the main line at a suitable point within one hundred yards of the Hackensack river, if the said main line shall cross said river within one hundred yards of the present bridge; but if the said main line shall cross said river at a greater distance 20 from said bridge, then to such point on said main line, west of said river, as may be best calculated to give to said ferries equal facilities of communication with Newark; and if the said company shall not make any such branch as soon as the main line shall be made from Newark to the Hudson, then it shall be lawful for any person or persons owning such ferry, to construct such branch as aforesaid, and to charge tolls thereon in the same manner, and at the same rates, as this corporation is authorized to charge; and for the purpose of constructing said branch railroad, he or they shall be invested with the same privileges, and be subject to the same liabilities and reservations, as this corporation are entitled and subject to; and the said companies and their agents and servants, or others in their employ, may enter upon, take possession of, and use and excavate or level any land which may be wanted for the site of the said road; but all lands and real estate thus entered upon, which are not donations, shall be purchased by the said corporation, of the owner or owners thereof, at a price to be mutually agreed upon between them; and in case of a disagreement as to price, it shall be the duty of either of the Justices of the Supreme Court, upon a notice to be given him by the said corporation, or by the owner or owners of such land or real estate, to appoint three 30 disinterested commissioners from the county in which the lands 40

lie, to determine the compensation and damages which the owner or owners of the said real estate or land have sustained, by reason of the occupancy thereof by the said corporation; the said commissioners are also directed and required to assess the damages which any individual or individuals may sustain by the said road, arising from the removing, making and maintaining the fencing on the line of the route of said road, through any improved lands over which the same may run; and it shall be the duty of the said commissioners, after having taken an oath
10 or affirmation faithfully and impartially to discharge the trust herein reposed in them, to deliver to the said corporation a written statement, signed by them, or a majority of them, of the award they shall make, containing a description of the lands or real estate appraised, together with the amount of assessment for running, making, and maintaining the fencing, to be recorded by the said corporation, in the office of the clerk of the county where such lands are situated; and upon payment or tender of such compensation as aforesaid, to the said owner or owners, then the said corporation shall be deemed seized and
20 possessed in fee simple of all such land or real estate; and in case any owner or owners of such land or real estate so appraised, shall be *feme covert*, under age, non compos mentis, or out of the state, then, and in such case, the said corporation shall pay the amount which has been awarded as due to the last mentioned owners respectively, into the Court of Chancery, to the clerk thereof, subject to the order of said court for the use of the said owner or owners; all which proceeding shall be had at the proper costs and charges of the said corporation, to be determined by the said Justice of the Supreme Court; *Provided always*, that should the owners of any real estate, land or materials, feel himself or themselves aggrieved by the decision of the commissioners aforesaid, he or they may appeal to the next Court of Common Pleas, in the county where the land lies, reserving to either party the right of trial by jury in such court, and the decision of said court, in the premises, shall be final and conclusive; but the party so appealing, shall in no case be entitled to any costs, unless a larger sum shall be recovered than that awarded by the commissioners; *And Provided also*, that in case the said company, after the same is completed, shall abandon the said road, or any part thereof, or cease to use and keep the same, or any part thereof, in repair, at any time for three successive years, that then, and in that case, this charter shall be annulled, and the title to the lands over which the said road shall pass,

shall be re-vested in the person or persons from whom the lands were taken by concession or by inquisition, as aforesaid, their heirs and assigns: *And Provided further* if the State of New Jersey shall take possession of said road, then the said road and the title to the said lands shall be, and hereby is, vested in the State of New Jersey, so long as they shall maintain the same.

Sec. 7. *And be it enacted*, That the said corporation may build bridges, fix scales and weights, raise embankments, or make any other works necessary for the construction, use or enjoyment of the said railroad, and may also enter upon said road, 10 and take possession of and use any materials necessary therefor; and if the said corporation, and the owner or owners of such materials, do not agree as to price, the same shall be determined and settled in the manner heretofore provided for in the case of real estate or land; and in case of any damage done to the lands contiguous, by workmen and teams in the employ of the said corporation, either in constructing, repairing, or maintaining said railroad, the damages shall be determined in like manner by commissioners appointed as aforesaid.

Sec. 8. *And be it enacted*, That the said president and directors shall have power to charge and demand tolls and rates for the passage of all carriages upon the said railroads and roads, and to fix, make, and at pleasure, change and alter such tolls and rates, and also to make regulations and rules for the collection and levying of the same, and to regulate the time and manner of transporting goods and passengers, and manner of collecting tolls on the said railroad, and also the description and formation of carriages that shall or may be used on said railroad, and all necessary machines, engines, wagons, carriages or vehicles; *provided*, that the said corporation shall cause the rates 20 of tolls charged to be inscribed or painted in some conspicuous place at each gate where tolls shall be required to be paid; *provided*, also, that the said tolls so to be charged, shall at no time, exceed the following rates, viz.: For an empty carriage with its appendages, weighing less than one ton, two cents per mile; above one and under two tons, four cents per mile; above three tons or more, eight cents per mile; and the following additional tolls for passengers and freight, viz.: In the carriages as charged as aforesaid, for every species of property, six cents per ton per mile, and three cents per mile for each and every passenger carried on said railway, in said carriages; *and provided also*, that no farmer belonging to this State, shall be required to pay any toll for the transportation of the produce of his farm to market 40

over the said road or roads, as the cars carriage, weighing no more than one ton, when the weight of such produce shall not exceed one thousand pounds, but the said farms may be charged toll as for an empty carriage, provided also that it shall be lawful for the said company to erect and build a small coal road from their present route, or railroads, to any landing or at any place the Susquehanna river, and north of Binghamton, at to any point or points within the boundaries of Susquehanna, so long as the same continues, and to charge tolls thereon, in the same manner and

§ 6 *in the same rate as this corporation is authorized to charge.*
Sec. 5. *And be it enacted,* That it is the intention of the General Assembly, shall and, within two years from the passing of this act, commence the construction of said road or from City and New Bremen, and within ten years thereafter, complete, finish and put it in operation the said railroad or road. That the said corporation shall thenceforth receive rents, tolls and charges for said road.

Sec. 6. *And be it enacted,* That the said corporation shall have power to purchase the simple roads and bridges on the route of the said railroad, which they may deem necessary, or any part of the same, at its cost, and at such rates and charges computes, and to hold the same in accordance therewith, and the State and individual contributions of the North Susquehanna Company, shall be so liberally applied to the capital and funds created, at any time within five years after the opening of the roads, or otherwise, as may be necessary, to make up the fair actual value of their share in the aforesaid company, at the time of passing this act, and to exchange therefor, and the said corporation shall receive from the State and the sum of one billion of the said company, if computed on its fair and just value by these persons, and to pay the same to the said value thereof as aforesaid, or may be mutually agreed upon within two years from the passing of this act, or in case of the disagreement, so that it may be determined and determined by the Clerk of the State, provided that the said roads and bridges and the bridges over the rivers Chenango, Susquehanna and Oneida, and road, shall be preserved without obstruction or public roads, as heretofore, subject to the payment of their agreed charges, provided also that nothing herein contained shall be construed so to impair any hereditary, ancient or feudal rights which the State or any incorporated authority or corporation, or any individual may possess, in virtue of an original title, nor for building bridges over the rivers Susquehanna and Oneida.

какой вид бы этот драматург. Важно понимать, что не только писатели-художники являются создателями мира, но и их поклонники. Но «Большой Пушкин» — это не просто писательский мир.

The use of *hedge* or *diagonal* terms like *He* and *cooperative* can encourage the user's 'softened' picture of how the form of political process of *democracy* or *conservatism*, of *He* and *cooperative*, can be self-explaining, while leaving open room for other factors. In contrast, to insist on *overdetermination* of *soft*, *weak* or *conservative* as the sole *causal* variables (Foucault's *discourse* like it and *He* and *cooperative* both have a supposed *decisive* and *uniquely causal* role) is such a refusal. This kind of *theory* is static and static *historical* like the approach used by both *Freud* and *Marx*. It is this static, *dead* static, and this *He* static, a picture according with which the only *dynamic* stuff would be that *dead* static plus *more dead* static added to *dynamic* static, *nothing*. This *static* situation is generic. *Heidegger* and *Marx* have both made an *over-determination* of *additiveness*, and *multidimensionality* is needed to move beyond a *static* picture. In other words there has to be an *average* of *multiple* static *existing* models, and this *over-determination* is right. The only thing to beware is that *multiple* static, *over-*

said draw, the directors of said company shall forfeit and pay the sum of ten dollars to be recovered with costs, in any court having jurisdiction by any person who shall sue for the same, within six months after the time of such neglect.

Sec. 13. *And be it enacted*, That the president and directors of the said company shall have power to have constructed, or to purchase with the funds of the company, and to place on any railroad constructed by them, all machines, engines, wagons, carriages and vehicles, for the transportation of persons, or any **10** species of property thereon, that they may think reasonable, expedient and right: *Provided*, that they shall not charge more than at the rate of six cents per mile per ton, for the transportation of property on the said road or roads, or six cents per mile for carrying each passenger on said railway, in the carriages of the company: *Provided also*, that the said company shall not be authorized to charge more than the sum of one dollar and twenty-five cents for each and every passenger carried on the said road, from and to the cities of New Brunswick and New York.

Sec. 14. *And be it enacted*, That the said company may have **20** and hold real estate at the commencement and terminations of said road or roads, not exceeding three acres at each place, and may erect and build thereon, houses, warehouses, stables, machine shops, and other buildings and improvements, as they may deem expedient for the safety of property, and construction of carriages and other necessary uses, and take and receive the rents, profits and emoluments thereof, and shall have the privilege and authority to erect, build and maintain, on the rivers Passaic and Hackensack respectively, such wharves, piers, bridges, and other facilities as they may think expedient and necessary for the full **30** enjoyment of all the benefits conferred by this act.

Sec. 15. *And be it enacted*, That if any person or persons shall wilfully or maliciously injure the said railroad, or any building, machinery, or other work of the said corporation, appertaining thereto, such person shall forfeit and pay therefor, to the said corporation, three times the amount of the damages sustained by means of such offence or injury, to be recovered in the name of the said corporation, with costs of suit, in any court having cognizance of the same.

Sec. 16. *And be it enacted*, That on the first day of January **40** next, after the completion of the said roads, the president and treasurer, and a majority of the directors of the said corporation, shall exhibit to the Governor of this State, on oath or affirmation, a true and perfect account of all the cost and expenditure of said

corporation, in making said railroad, and the same shall be filed in the office of the secretary of this State, and the amount therein specified shall be deemed and taken to be the true value of said road; and it shall be the duty of the treasurer of the said corporation, under his oath or affirmation, to make thereafter, annual returns of the number of passengers, the number of tons of goods, wares and merchandises, transported upon said railroad, to the treasurer of this State.

Sec. 17. *And be it enacted*, That at any time after the expiration of thirty years, from the completion of the said road, the legislature of this State may cause an appraisement of the said road and the appendages thereof, to be made by six persons, three of whom shall be appointed by the Chief Justice of this State, for the time being, the remaining three by the company, who, or a majority of them, shall report the value thereof to the legislature, within one year from the time of their appointment; or if they cannot agree, they shall choose a seventh, who, with the aforesaid six, shall report as aforesaid; or in case the said company shall neglect or refuse to appoint the said three persons on their part, for two months after the said appointment by the said Chief Justice, then the three persons so appointed by him, shall proceed to make such appraisement, which shall be binding on the said company, or in case the said six commissioners shall be appointed as aforesaid, and they cannot agree upon the seventh man, then upon two weeks' notice to the said company, the said Chief Justice shall appoint such seventh man as aforesaid, to make such appraisement as aforesaid; and thereupon the State shall have the privilege, for three years, of taking the said road, upon the payment to the company of the amount of the said report, within one year after electing to take said road, which report shall be filed in the office of the secretary of this State; and the whole property and interest of said road, and the appendages thereof, shall be vested in the State of New Jersey, upon the payment of the amount so reported to the said company; and that it shall be the duty of the president of the company to lay before the legislature, under oath or affirmation, when they shall so request, a full and fair statement of the costs of the said road, and of all the receipt and disbursements of the company; *Provided always*, that the aforesaid valuation shall be made without reference to the receipts or disbursements of the company, or advance of the stock; and the said valuation shall in no case exceed the first cost of the said railroad, with the lands and appendages thereof.

Sec. 18. *And be it enacted*, That from and after the completion of the said railroad, and after the expiration of five years, the said corporation shall pay into the treasury of this State, yearly and every year, a tax of one-quarter of one per cent. upon their capital stock paid in; and after the expiration of ten years, a tax of one half of one per cent. upon the true amount of the capital stock of said company, and that no other or further tax or imposition shall be levied or imposed upon the said company; *Provided, nevertheless*, that in addition to the above, if at any

10 time hereafter, any railroad shall intersect or be attached to the railroad hereby established, so as to make a continued line of railroads, carrying passengers across the State of New Jersey, between the States of New York and Pennsylvania, respectively, then it shall be the duty of the treasurer of the company hereby chartered, under oath or affirmation, to make quarterly returns of the number of passengers, and the number of tons of goods, wares and merchandise, transported over the whole line of the road hereby chartered, to the treasurer of this State, for the time being, and thereupon to pay the said treasurer of this State at **20** the rate of eight cents for each and every passenger, and the sum of twelve cents for each and every ton of goods, wares and merchandise, so transported thereon in manner aforesaid.

Sec. 19. *And be it enacted*, That it shall and may be lawful for the president and directors for the time being, whenever they may deem it expedient, to call a special meeting of the stockholders, by giving the like notice as hereinbefore directed, for choosing directors, specifying therein the object of said meeting; but that no business shall be transacted by such meeting, unless there be present a majority in value of the stockholders, who may **30** require any books, accounts, securities, or other papers of said corporation to be exhibited before them.

Sec. 20. *And be it enacted*, That it shall be the duty of the said company to construct and keep in repair, good and sufficient bridges or passages over or under the sail rail road or roads, where any public or other road shall cross the same, so that the passage of carriages, horses and cattle on said road shall not be impeded thereby; and also, where the said road shall intersect any farm or lands of any individual, to provide and keep in repair suitable wagon ways over or under said road, so that they may **40** pass and repass to and from the same.

Sec. 21. *And be it enacted*, That the State shall have the privilege of subscribing for one-fourth of the capital stock of this company, and shall have the appointment of three of the said

directors of the company to represent the same; but if the said stock shall not be subscribed for, within two years after the location of the route of said road shall have been fixed and determined upon, and filed in the office of the Secretary of State, then the right to subscribe therefor by the State shall cease.

Sec. 22. *And be it enacted*, That this act shall be deemed and taken as a public act, and shall at all times be recognized as such in all courts and places whatsoever.

Sec. 23. *And be it enacted*, That no part of the funds of this company shall be used for banking, or other purposes, not plainly 10 indicated by the provisions of this act.

Passed March 7, 1832.

**Printed Instructions to Enginemen and Firemen,
Dated March 17, 1910. D 3.**

PENNSYLVANIA RAILROAD COMPANY.

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Philadelphia, Baltimore & Washington Railroad Company.

Northern Central Railway Company.

West Jersey & Seashore Railroad Company.

CIRCULAR 81-A.

*Instructions to Enginemen and Firemen for the Economical
Use of Coal.*

(Superseding instructions No. 81, dated June 1, 1908.)

80

1. Enginemen and firemen must work together so as to save coal and reduce smoke.
2. Enginemen and firemen when taking charge of a locomotive must see that the fire, grates and ash pan are in good condition, so as to prevent engine failures on the road.
3. Enginemen must include in their reports on M. P. Form 62 all defects causing leaks of steam or water in any part of the locomotive, as the repairs of these defects will avoid loss of coal.
4. The burning of bituminous coal in a locomotive requires 40 air, which must be admitted through the grates and through the fire door.

Smoke means waste of coal and must be avoided.

Large quantities of coal placed in the firebox at one time cool down the fire, cause smoke and waste coal; small quantities at regular intervals will keep the fire bright, prevent smoke and take less coal to keep up steam pressure.

Lumps of coal should be broken in pieces not larger than three inches.

5. A bright and level fire over the whole grate must be carried whenever possible. When a sloping fire is used, no more coal should be banked at the door than is necessary.

10 6. To prevent smoke and to save coal, the fire door must be placed on or against the latch after firing coal or using the scraper, slash bar or hook, and when on sidings, in yards, at terminals, or before starting.

7. Before the throttle is closed, the blower must be used and the door placed on the latch. Firemen must stop firing long enough before steam is shut off to prevent smoke and waste of coal.

8. Dead spots in the fire must be avoided when running with throttle closed, as this frequently causes flues to leak.

20 9. The grates must be shaken as often as is necessary to clear the fire of ash and clinker in order to admit sufficient air, and in such a manner as to avoid the loss of good fire. Care should be taken to place the grates level after each operation.

10. The waste of steam at safety valves must be avoided. One shovel full of coal is required to make the steam that escapes from a safety valve in one minute.

11. The sprinkling hose attached to the injector must be used frequently to keep down dust on the foot plate and in the cab and to wet coal in the tender. However, too much water on the 30 coal should be avoided, as to some extent this practice is the cause of flues stopping up.

12. Coal must not be allowed to collect or remain on the foot plate, but should be swept into the coal space of tender, and not out on the tracks.

13. Engines must not be brought into terminals with a dead fire, which will cause flues to leak; nor with too heavy a fire, which will cause waste of coal.

14. When banking or cleaning fires, the blower should be used as lightly as possible. After the fire has been cleaned of ash and 40 clinker, the clean fire must be placed at the front end of the grates and maintained in good condition.

15. When cleaning fires or with a banked fire, excessive use of the injectors must be avoided, as this will result in injury to the flues.

16. After taking coal at coaling stations, the fireman must do the necessary trimming of coal pile, to insure the prevention of coal falling off of tenders while in transit, which is both wasteful and dangerous to passing trains, trackmen, etc.

17. Coal can be saved by the proper use of the injector in pumping locomotive regularly, and by taking advantage of every opportunity to fill boiler when not working locomotive to full capacity; also by using the injector to avoid the safety valves blowing off.

18. Coal will be saved by always working the locomotive (except when starting) with a full throttle when the cut-off is one-quarter of the stroke or greater; but if one-quarter cut-off with full throttle gives more power or speed than is needed, the reverse lever should be left at one-quarter cut-off and the throttle partially closed as needed.

A. W. GIBBS,

General Superintendent Motive Power.

APPROVED:

W. HEYWARD MEYERS,

General Manager.

20

MARCH 17, 1910.

**Printed Instructions to Enginemen and Firemen,
dated June 1, 1908. D 4.**

THE PENNSYLVANIA RAILROAD COMPANY,

Philadelphia, Baltimore & Washington Railroad Company

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Northern Central Railway Company

West Jersey & Seashore Railroad Company.

CIRCULAR 81.

*Instructions to Enginemen and Firemen for the Economical
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2. Enginemen and firemen when taking charge of a locomotive must see that the fire, grates and ash pan are in good condition so as to prevent engine failures on the road.

3. Enginemen must include in their reports on M. P. Form 62 all defects causing leaks of steam or water in any part of the locomotive, as the repairs of these defects will avoid loss of coal.

4. The burning of bituminous coal in a locomotive requires air, which must be admitted through the grates and through the fire door.

Smoke means waste of coal and must be avoided.

Large quantities of coal placed in the firebox at one time cool 10 down the fire, cause smoke and waste coal; small quantities at regular intervals will keep the fire bright, prevent smoke and take less coal to keep up steam pressure.

Lumps of coal should be broken in pieces not larger than three inches.

5. A bright and level fire over the whole grate must be carried whenever possible. When a sloping fire is used, no more coal should be banked at the door than is necessary.

6. To prevent smoke and to save coal, the fire door must be placed on or against the latch after firing coal or using the 20 scraper, slash bar or hook, and when on sidings, in yards, at terminals or before starting.

7. Before the throttle is closed, the blower must be used and the door placed on the latch. Firemen must stop firing long enough before steam is shut off to prevent smoke and waste of coal.

8. Dead spots in the fire must be avoided when running with throttle closed, as this frequently causes flues to leak.

9. The grates must be shaken as often as is necessary to clear the fire of ash and clinker in order to admit sufficient air, and in such a manner as to avoid the loss of good fire. Care should be taken to place the grates level after each operation.

10. The waste of steam at safety valves must be avoided. One shovel full of coal is required to make the steam that escapes from a safety valve in one minute.

11. The sprinkling hose attached to the injector must be used frequently to keep down dust on the foot-plate and in the cab, and to wet coal in the tender. However, too much water on the coal should be avoided, as to some extent this practice is the cause of flues stopping up.

40 12. Coal must not be allowed to collect or remain on the foot-plate, but should be swept into the coal space of tender, and not out on the tracks.

13. Engines must not be brought into terminals with a dead

fire, which will cause flues to leak; nor with too heavy a fire, which will cause waste of coal.

14. When banking or cleaning fires, the blower should be used as lightly as possible. After the fire has been cleaned of ash and clinker, the clean fire must be placed at the front end of the grates and maintained in good condition.

15. When cleaning fires or with a banked fire, excessive use of the injectors must be avoided, as this will result in injury to the flues.

16. The overloading of tenders at coaling stations must be 10 avoided, to prevent the danger and waste from coal falling off.

17. Coal can be saved by the proper use of the injector in pumping locomotive regularly, and by taking advantage of every opportunity to fill boiler when not working locomotive to full capacity; also by using the injector to avoid the safety valves blowing off.

18. Coal will be saved by always working the locomotive (except when starting) with a full throttle when the cut-off is one-quarter of the stroke or greater; but if one-quarter cut-off with full throttle gives more power or speed than is needed, the reverse lever should be left at one-quarter cut-off and the throttle partially closed as needed. 20

A. W. GIBBS,

General Superintendent Motive Power.

APPROVED:

W. W. ATTERBURY,

General Manager.

June 1, 1908.

**Printed Instructions to Enginemen and Firemen,
dated July 24, 1902. D 5. 80**

PENNSYLVANIA RAILROAD COMPANY.

U. R. R. of N. J. Division.
Motive Power Department.

NOTICE TO ENGINEMEN AND FIREMEN.

Instructions in Regard to Firing Bituminous Coal.

Enginemen are expected to see that their engines make as little smoke as possible at all times, and especially when running through cities and when in and about passenger stations. 40

The bituminous coals contain a large amount of gas which is liberated by heat. This gas, if not consumed, will appear at the stack in the form of black smoke, but, if mixed with a sufficient quantity of air at a high enough temperature, will burn and pass off as a colorless vapor.

10 If large quantities of coal are charged at one time, it is impossible to admit enough air under the required conditions, for the perfect combustion of the large amount of gas generated, hence, the greatest economy of fuel and the discharge of the least smoke, are only to be obtained by firing small quantities of coal at frequent intervals, in order that the amount of air passing into the firebox will be sufficient for the complete combustion of the gases.

20 It will readily be seen that the amount of air which passes through the firebox is dependent on the force of the draft, as well as on the amount of opening for its admission, and on this account, larger quantities of coal can be charged at a time while the engine is being worked hard than when a light throttle is used; the best results will be obtained only by firemen who realize this and fire accordingly.

On the long firebox engines when working up to their full capacity, *two shovelfuls* of coal may be charged at a time without bad results; but at ordinary work and on the short firebox engines, good results cannot be obtained if more than *one shovelful* is charged at a time.

Fires should be carried light enough to permit air to pass through them freely, as it is not possible to admit air enough at the door to burn the gases, without affecting the steam pressure.

30 *As far as practicable, the door should be run on the latch, and after coal is put in, left partially open until it can be closed without causing black smoke to appear at the stack.*

When it is necessary to fire two or more shovelfuls of coal at one time, and one of them is required in the front of the firebox, the first shovelful should be thrown there, so that the large amount of gas liberated from it can have for its combustion the air entering at the firebox door, while the second shovelful is being put in. The latter should if possible be placed at the back of the firebox where the gases are liberated less rapidly and the air has a better chance to mix with it. For the same reason, when lumps are mixed in with fine coal, they should be thrown to the front as far as it is practicable and the fine coal placed near the door—this will also result in less of the fine coal being drawn through the flues.

When the throttle is closed and the draft produced by the exhaust ceases, the amount of air passing through the firebox is proportionally reduced, and unless precautions are taken to prevent it, a large quantity of black smoke will be discharged; this too, usually at a time when it is most objectionable, for, when approaching stations, the doors of the cars are often open and the smoke not having the force of the exhaust to carry it up in the air, falls down over the train and fills the cars. In order to prevent this nuisance, when approaching all regular "shutting off" places, firemen should stop firing long enough before shutting off to permit a good deal of the gas to be consumed. Before the throttle is closed, the door should be placed on outer latch and blower put on and kept on until it can be closed without black smoke appearing at the stack. 10

It has been proved that by carefully following these instructions, the amount of smoke will be reduced to such an extent that it ceases to be a serious source of annoyance and complaint. Firemen must therefore give this matter careful and earnest attention without losing sight of the necessity of maintaining the steam pressure, and their success in firing with as little smoke as possible will be considered one of the first qualifications for their advancement. 20

Approved:

F. L. SHEPPARD,

General Superintendent.

H. S. HAYWARD,

Superintendent Motive Power.

Office Stupt. M. P., Jersey City, July 24th, 1902.

30

**Printed Instructions to Enginemen and Firemen,
Dated July 23, 1890. D 6.**

PENNSYLVANIA RAILROAD COMPANY.

Phila., Wilmington & Baltimore R. R.
Baltimore & Potomac Railroad,
Washington Southern Railway.
Northern Central Railway.
West Jersey Railroad.
Camden & Atlantic Railroad.

40

Motive Power Department.

NOTICE TO ENGINEMEN AND FIREMEN.

Instructions in Regard to Firing Bituminous Coal.

Enginemen are expected to see that their engines make as little smoke as possible at all times, and especially when running through cities and when in and about passenger stations.

10 The bituminous coals contain a large amount of gas which is liberated by heat. This gas, if not consumed, will appear at the stack in the form of black smoke, but, if mixed with a sufficient quantity of air at a high enough temperature, will burn and pass off as a colorless vapor.

If large quantities of coal are charged at one time, it is impossible to admit enough air, under the required conditions, for the perfect combustion of the large amount of gas generated, hence, the greatest economy of fuel and the discharge of the least smoke, are only to be obtained by firing small quantities of coal at frequent intervals, in order that the amount of air passing into the firebox will be sufficient for the complete combustion of the gases.

20 It will readily be seen that the amount of air which passes through the firebox is dependent on the force of the draft, as well as on the amount of opening for its admission, and on this account, larger quantities of coal can be charged at a time while the engine is being worked hard than when a light throttle is used; the best results will be obtained only by firemen who realize this and fire accordingly.

On the long firebox engines when working up to their full capacity, three shovelfuls of coal may be charged at a time without bad results; but at ordinary work and on the short firebox engines, good results cannot be obtained if more than two shovelfuls are charged at a time. When doing exceptionally light work not more than one shovelful should be charged at a time.

Fires should be carried light enough to permit air to pass through them freely, as it is not possible to admit air enough at the door to burn the gases, without affecting the steam pressure.

As far as practicable, the door should be run on the latch, and after coal is put in, left partially open until it can be closed without causing black smoke to appear at the stack.

When it is necessary to fire two or more shovelfuls of coal at one time, and one of them is required in the front of the

firebox, the first shovelful should be thrown there, so that the large amount of gas liberated from it can have for its combustion the air entering at the firebox door while the second shovelful is being put in. The latter should if possible be placed at the back of the firebox where the gases are liberated less rapidly and the air has a better chance to mix with it. For the same reason, when lumps are mixed in with fine coal, they should be thrown to the front as far as is practicable and the fine coal placed near the door—this will also result in less of the fine coal being drawn through the flues.

When the throttle is closed and the draft produced by the exhaust ceases, the amount of air passing through the firebox is proportionally reduced, and unless precautions are taken to prevent it, a large quantity of black smoke will be discharged; this too, usually, at a time when it is most objectionable, for, when approaching stations, the doors of the cars are often open and the smoke not having the force of the exhaust to carry it up in the air, falls down over the train and fills the cars. In order to prevent this nuisance, when approaching all regular "shutting off" places, firemen should stop firing long enough before shutting off, to permit a good deal of the gas to be consumed. Before the throttle is closed, the door should be opened and blower put on and kept on until it can be closed without black smoke appearing at the stack.

It has been proved that by carefully following these instructions, the amount of smoke will be reduced to such an extent that it ceases to be a serious source of annoyance and complaint. Firemen must therefore give this matter careful and earnest attention without losing sight of the necessity of maintaining the steam pressure, and their success in firing with as little smoke as possible will be considered one of the first qualifications for their advancement.

J. A. COVERT,

Road Foreman of Engines.

Approved:

JES. CRAWFORD,

Superintendent.

J. S. HAYWARD,

Supt. of Motive Power.

Jersey City, N. J.

July 23d, 1890.

Deed. D 11.

U. S. R. Stamp \$11.50.
 Edward Coles Executor of
 William F. Coles
 To
 The New Jersey Rail Road
 and Transportation Com-
 pany.

Deed
 Dated
 October 1st, 1868.

10

This Indenture made this first day of October in the year of our Lord One thousand eight hundred and sixty eight.

Between Edward Coles sole acting Executor of the last will and testament of William F. Coles deceased party of the first part. And The New Jersey Rail Road and Transportation Company party of the second part.

Witnesseth that the said parties of the first part by virtue of the power and authority to him given in and by the said last will and Testament and for and in consideration of the sum of Eleven thousand and three hundred dollars lawful money of the United States of America to him in hand paid at or before the ensealing and delivery of these presents by the said parties of the second part the receipt whereof is hereby acknowledged and the said parties of the second part their successors and assigns forever released and discharged from the same by these presents have granted bargained sold aliened released conveyed and confirmed and by these presents doth grant bargain sell alien release convey and confirm unto the said parties of the second part their successors & assigns forever.

80 All those certain seven lots pieces or parcels of land situate lying and being in the Fifth Ward of Jersey City County of Hudson and State of New Jersey being designated as lots numbered Twenty one (21) Twenty two (22) Twenty three (23) and Twenty four (24) in block numbered Two hundred and sixty seven (267) and lots numbered Twenty eight (28) and Twenty nine (29) and Thirty (30) in Block numbered Two hundred and forty nine (249) and colored brown on a map on file in the office of the Clerk of said County of Hudson showing the partition of the land at Pavonia in said Jersey City among the heirs of John B. Coles deceased said lots numbered Twenty Twenty one (21) Twenty two (22) Twenty three (23) and Twenty four (24) in block numbered Two hundred and sixty seven (267) taken together being bounded and described as follows: Beginning on the

southeasterly corner of Paterson and South Third Streets thence running easterly along the southerly line of South Third Street one hundred (100) feet thence southerly parallel with Paterson Street one hundred feet (100) thence westerly parallel with South Third Street to Newark Avenue thence northwesterly along Newark Avenue to Paterson Street thence northerly along the easterly line of Paterson Street to the point or place of beginning said lots numbered Twenty eight (28) Twenty nine (29) and Thirty (30) in block numbered Two hundred and forty nine (249) taken together being bounded and described as follows: Beginning at a point in the southerly line of South Third Street distant One hundred and seventy five (175) easterly from the southeasterly corner of South Third and Brunswick Streets thence running easterly along the southerly line of South Third Street seventy five (75) feet thence southerly parallel with Brunswick Street Ninety five (95) feet to a certain alley way of Ten (10) feet in width running through the centre of the block parallel with & equidistant from South Third and South Fourth Streets thence westerly along said alley way and parallel with South Third Street seventy five (75) feet thence northerly parallel with Brunswick Street Ninety five (95) feet to South Third Street the point or place of beginning.

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Together with that part of said Alley Way being between the centre line thereof and the premises herein described the use of said alley way having been reserved for the benefit of the owners and occupants adjoining thereto.

Together with all and singular the edifices buildings rights members privileges advantages hereditaments and appurtenances to the same belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof.

30

And also all the estate right title interest claim and demand whatsoever both in law and in equity which the said Testator had in his lifetime and at the time of his decease and which the said party of the first part or had or hath by virtue of the said last will and testament or otherwise of in and to the same and every part and parcel thereof with the appurtenances.

To have and to hold the said premises above mentioned and described and hereby granted and conveyed or intended so to be with the appurtenances unto the said parties of the second part their successors and assigns to their only proper use benefit and behoof for ever.

40

And the said party of the said part doth covenant grant promise

and agree to and with the said parties of the second part their successors and assigns that the said parties of the second part their successors and assigns shall and lawfully may from time to time and at all times forever hereafter peaceably and quietly have hold use occupy possess and enjoy all and singular the said hereditaments and premises hereby granted and conveyed or so intended to be with their and every of their appurtenances and receive and take the rents issues and profits thereof to and for their own use and benefit without any lawful let suit hindrance molestation in
10 terruption or denial whatsoever or from or by him the said party of the first part or his assigns; or of from or by any other person or persons whomsoever lawfully claiming or who shall or may lawfully claim hereafter by from or under him or by from or under his right title interest or estate and that free and clear and freely and clearly discharged acquitted and exonerated or otherwise well and sufficiently saved defended and kept harmless and indemnified by the said party of the first part his heirs and assigns or from and against all and all manner of former and other gifts grants bargains sales mortgages judgments and all other charges
20 and incumbrances whatsoever had made committed executed or done by him the said party of the first part or by through or with his acts deed means consent procurement or privity.

In Witness Whereof the said party to these presents hath hereunto interchangeably set his hand & seal the day and year first above written.

EDWARD COLES, Ex (L.S.)

Sealed and Delivered in the presence of

JOHN B. COLES.

30 STATE OF NEW JERSEY }
Hudson County, } ss.

Be it Remembered that on this Twenty sixth day of October Eighteen hundred and sixty eight before me the subscriber a Master in Chancery of said State personally appeared John B. Coles who by me being duly sworn according to law on his oath deposeth and says that he saw the said Edward Coles the within named grantor sign seal and deliver the within indenture of deed as his voluntary act and deed and that he the said John B. Coles subscribed his name thereto at the same time as an attesting witness.

Subscribed and sworn this 26th day of October A. D. 1868.

JOHN B. COLES.

LUTHER S. ELMER

Master in Chancery of N. J.

Received in the office & Recorded November 3d 1868 at 11 $\frac{3}{4}$
O'Clock A. M.

STATE OF NEW JERSEY, }ss.
County of Hudson.

I, JOHN J. McMAHON, Register of the County of Hudson, do hereby certify that the foregoing is a true and correct copy of a certain deed as the same is on record in my office in book 178 of deeds on page 565, etc.

In testimony whereof, I have hereunto set my hand and seal 10
this sixteenth day of October A. D., 1911.

[L. S.]

JOHN J. McMAHON,

Register.

By C. M. AUSTIN,

Deputy Register.

Deed. D 12.

U. S. R. Stamp \$12.50

Andrew C. Morris & Benjamin C. Morris & Coles
Morris Trustees
to
The New Jersey Rail Road and Transportation Company.

} Deed
Dated
October 1st, 1868. 20

This Indenture made the First day of October in the year One thousand eight hundred and sixty eight.

Between Andrew C. Morris Benjamin C. Morris and Coles Morris surviving Trustees & Successors to William T. Coles deceased only surviving Trustee of Eliza F. Morris appointed by a decree of the Court of Chancery of the State of New Jersey dated 20 May 1865 and duly entered with the Clerk of said County parties of the first part and The New Jersey Rail Road and Transportation Company parties of the second part. 80

Now this Indenture Witnesseth that the said parties of the first part for and in consideration of the sum of Twelve thousand and five hundred dollars lawful money of the United States of America to them in hand paid at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold aliened released conveyed and confirmed and by these presents do grant bargain sell alien release convey 40

and confirm unto the said parties of the second part their successors and assigns for ever.

All those eight certain lots pieces or parcels of land situate lying and being in the Fifth Ward of Jersey City County of Hudson and State of New Jersey being designated as lots numbered One (1) Two (2) Three (3) and Four (4) Twenty five (25) Twenty six (26) Twenty seven (27) and Twenty eight (28) in block numbered Two hundred and sixty seven (267) and colored Green on a map on file in the office of the Clerk

- 10 of said County of Hudson showing the partition of the land at Pavonia in said Jersey City among the heirs of John B. Coles deceased said lots numbered One (1) Two (2) Three (3) and Four (4) taken together being bounded and described as follows: Beginning at the southwesterly corner of Brunswick and South Third Streets thence running southerly along the westerly line of Brunswick Street One hundred (100) feet thence westerly parallel with South Third Street thence Northerly parallel with Brunswick Street One hundred (100) feet to South Third Street thence easterly along the southerly line of South Third Street
20 One hundred (100) feet to Brunswick Street the point or place of beginning. Said lots numbered Twenty five (25) Twenty six (26) Twenty seven (27) and Twenty eight (28) taken together being bounded and described as follows; beginning at a point in the southerly line of South Third Street distant One hundred (100) feet easterly from the southeasterly corner of Paterson and South Third Streets thence running easterly along the southerly line of South Third Street One hundred (100) feet thence southerly parallel with Patterson Street One hundred (100) feet thence westerly parallel with South Third Street One
30 hundred (100) feet thence northerly parallel with Paterson Street One hundred (100) feet to South Third Street the point or place of Beginning.

Together with all and singular the tenements hereditaments and appurtenances unto the same belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof.

And also all the estate right title interest property claim and demand whatsoever as well in law as in equity of in and to the same and every part and parcel thereof.

- 40 To have and to hold the above mentioned and described premises hereby granted and conveyed or intended so to be with the appurtenances unto the said parties of the second part their successors and assigns to their only proper use benefit and behoof forever.

And the said parties of the first part do covenant promise and agree to and with the said parties of the second part that the said parties of the first part have not at any time made done committed or caused any act matter or thing whatsoever whereby or by means whereof the said premises hereby granted and released as aforesaid or any part thereof are or can in any wise be impeached or encumbered in title charged estate or other wise and also that the said parties of the second part their successors and assigns shall and may at all times hereafter peaceably and quietly have hold use occupy possess and enjoy the above granted bargained and described premises and every part and parcel thereof with the appurtenances and receive and take their rents issues and profits thereof to and for their own proper use and benefit without any let suit hindrance molestation eviction or denial of from or by the said parties of the first part their heirs or assigns or from of by any other person or persons whomsoever lawfully claiming or to claim any estate right title or interest of in or to the same by from or under them or either of them. 10

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written. 20

A. C. MORRIS (L. S.)
C. H. MORRIS (L. S.)
COLES MORRIS (L. S.)

Sealed and Delivered in the presence of J. C. MORRIS as to B. C. Morris Wm. H. MICHAELS as to Coles Morris ROBT. MURRAY as to C. H. Morris.

STATE OF NEW YORK,
City and County of New York, }ss. 30

I, Abraham V. W. Van Vechten a Commissioner of the State of New Jersey residing in the City of New York do certify that on the Seventeenth day of October in the year eighteen hundred and sixty eight in said City of New York before me personally appeared J. C. Morris with whom I am personally acquainted and whom I know to be subscribing witness to the execution of the foregoing instrument by B. C. Morris and who being by me duly sworn did depose and say that he resided at Morris-town New Jersey that the herein Benjamin C. Morris one of the persons described in and who executed the foregoing instrument that he saw the said Benjamin C. Morris sign seal and deliver 40

the same as his voluntary act and deed and the said B. C. Morris acknowledged to him the said deponent that he executed the same and that the said J. C. Morris thereupon subscribed his name as a witness to the execution of the foregoing instrument by the said B. C. Morris which is to me satisfactory evidence of the due execution of the same. I also certify that on the 19th day of October 1868 at the place above mentioned before me personally came Andrew C. Morris to me known to be one of the persons described in and who executed the foregoing instrument and the contents thereof being by me first made known to him he acknowledged to me that he signed sealed and delivered the same as his voluntary act and deed.

10

In Witness Whereof I have hereunto set my hand and seal at the City of New York this 19th day of October Eighteen hundred and sixty eight.

(Comms. Seal.)

A. V. W. VAN VECHTEN.

*Commissioner for New Jersey
in New York 46 Pine Street.*

STATE OF NEW YORK,
20 City and County of New York, }^{ss.}

I, Abraham V. W. Van Vechten a Commissioner of New Jersey residing in the City of New York do certify that on the Nineteenth day of October in the year Eighteen hundred and sixty eight in said City of New York before me personally appeared Wm. H. Michaels with whom I am personally acquainted and whom I know to be the subscribing witness to the execution of the foregoing instrument by Coles Morris and who being by me duly sworn did depose and say that he resided in the City of New York that he knew Coles Morris one of the persons described and who executed the foregoing instrument that he saw the said Coles Morris sign seal and deliver the same as his voluntary act and deed and that he the said Coles Morris acknowledged to him the said deponent that he executed the same and the said Wm. H. Michaels thereupon subscribed his name as witness to the execution of the foregoing instrument by Coles Morris which is to me satisfactory evidence of the due execution of the same. In Witness Whereof I have hereto set my hand and official seal at the City of New York this 19th day of October 1868.

30

(Comms. Seal.)

A. V. W. VAN VECHTEN.

*Commissioner for New Jersey
in New York.*

Received in the office & Recorded November 3d 1868
at 11 3/4 O'Clock A. M.

STATE OF NEW JERSEY, }
County of Hudson. }ss.

I, JOHN J. McMAHON, Register of the County of Hudson, do hereby certify that the foregoing is a true and correct copy of a certain deed as the same is on record in my office in Book 178 of Deeds on page 568 &c.

In testimony whereof, I have hereunto set my hand and seal this sixteenth day of October A. D., 1911.

[L. S.]

JOHN J. McMAHON,
Register. 10
 By C. M. AUSTIN,
Deputy Register.

Deed. D 13.

John B. Coles and Harriet His Wife & Eliza T. Coles. To The New Jersey Rail Road and Transportation Company.	Deed Dated December 19th, 1868. 20
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THIS INDENTURE made the nineteenth day of December in the year one thousand eight hundred and sixty eight.

Between John B. Coles and Harriet his wife of the City, County and State of New York and Eliza T. Coles of Jersey City in the County of Hudson and State of New Jersey of the first part and The New Jersey Railroad and Transportation Company a body corporate of the State of New Jersey party of the second part.

30

Witnesseth, that the said party of the first part for and in consideration of the sum of Six thousand dollars lawful money of the United States of America to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged from the same by these presents have granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part 40 and to their successors and assigns forever.

All those four certain lots, pieces or parcels of land, situate, lying and being in the Fifth Ward of Jersey City, County of

Hudson and State of New Jersey being designated as lots numbered twenty nine (29), thirty (30), thirty one (31) and thirty two (32) in Block numbered two hundred and sixty seven (267) and colored on a map on file in the Office of the Clerk of said County of Hudson showing the partition of the lands at Pavonia in said Jersey City among the heirs of John B. Coles deceased said four lots taken together are bounded and described as follows:

Beginning at a point on the southerly side of South Third Street
10 Street distant one hundred (100) feet westerly from the southwesterly corner of South Third and Brunswick Street; thence running southerly parallel with said Brunswick Street one hundred (100) feet; thence westerly parallel with South Third Street one hundred (100) feet; thence running northerly parallel with Brunswick Street one hundred (100) feet thence easterly along the southerly side of South Third Street one hundred (100) feet to the place of beginning.

Together with all and singular the tenements, hereditaments and appurtenances, thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

And also all the estate, right, title, interest, dower, right of dower, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above described premises and every part and parcel thereof, with the appurtenances. To have and to hold the above granted, bargained and described premises with the appurtenances, unto the said party of the second part, their successors and assigns, to their own proper use, benefit and behoof forever.

80 And the said John B. Coles and Eliza T. Coles for themselves their heirs executors and administrators doth covenant grant and agree to and with the said party of the second part their successors and assigns, that the said John B. Coles and Eliza T. Coles at the time of the sealing and delivery of these presents are lawfully seized in their own right of a good, absolute and indefeasible estate of inheritance in fee simple of, and in all and singular the above granted, bargained and described premises, with the appurtenances, and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid.

40 And that the said party of the second part their successors and assigns shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above

granted premises, and every part and parcel thereof with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part their heirs or assigns or by any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates judgments, taxes, assessments and incumbrances of what nature or kind soever. And also that the said parties of the first part and their heirs and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in, or to the hereinbefore granted premises, by, from, under or in trust for them shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, their successors and assigns make, do and execute or cause or procure to be made, done or executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, their successors and assigns forever, as by the said party of the second part, their successors or assigns, or their counsel learned in the law shall be reasonably devised, advised or required.

And the said John B. Coles and Eliza T. Coles for themselves, and their heirs the above described and hereby granted and released premises with the appurtenances unto the said party of the second part their successors and assigns against the said party of the first part and their heirs and against all and every person or persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of,

JOHN B. COLES. (L. S.)
HARRIET COLES. (L. S.)
ELIZA T. COLES. (L. S.)

Note:—The words southerly and Street interlined on 1st page before execution.

LUTHER S. ELMER as to Eliza T. Coles.
EDWIN F. COREY as to John B. Coles.

UNITED STATES OF AMERICA,
State of New York,
City & County of New York. } ss.

Be it remembered that on this twenty-first day of December in the year one thousand eight hundred and sixty-eight before me the undersigned Edwin F. Corey Jr. a Commissioner resident in the City of New York duly commissioned and qualified by the executive authority and under the laws of the State of New Jersey to take the acknowledgements of deeds to be used or
10 received therein personally appeared John B. Coles and Harriet his wife who, I am satisfied are the grantors in the annexed instrument named and I having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

And the said Harriet Coles being by me privately examined separate and apart from her said husband did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed freely and without any fear, threats or compulsion of or from her husband. In Witness Whereof, I have hereunto set my hand and affixed my hand and affixed my official seal the day and year aforesaid.

(Com'r Seal)

EDWIN F. COREY JUN.

Commissioner for the State of New Jersey Office 63 Wall Street New York.

STATE OF NEW JERSEY, } ss.
Hudson County.

Be it remembered that on this nineteenth day of December
30 eighteen hundred and sixty eight before me Luther S. Elmer a Master in Chancery of said State personally appeared Eliza T. Coles who I am satisfied is one of the grantors named in and who executed the within Indenture of Deed and I having first made known to her the contents thereof she did thereupon acknowledge that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

LUTHER S. ELMER M. C. C.

40 STATE OF NEW YORK, } ss.
City and County of New York.

On this twenty first day of December 1868 before me a Commissioner for the State of New Jersey residing in the City of New

York personally appeared John B. Coles and Harriet his wife who, I am satisfied are the grantors in the annexed Instrument named and who executed the same and I having first made known to them the contents thereof, they did severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. And the said Harriet Coles being by me privately examined separate and part from her said husband did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed freely and without any fear, threats or compulsion of or **10** from her said husband.

Witness my hand and official seal.

EDWIN F. COREY JUN.

Commissioner.

Received in the office and recorded Dec. 23rd, 1868 at 1.54 o'clock P. M.

STATE OF NEW JERSEY, }
County of Hudson. } ss.

I John J. McMahon, Register of the County of Hudson, do **20** hereby certify that the foregoing is a true and correct copy of a certain deed as the same is on record in my office in Book 181 of Deeds on page 351, &c.

In Testimony Whereof, I have hereunto set my hand and seal this sixteenth day of October A. D., 1911.

[I. S.]

JOHN J. McMAHON,

Register.

By C. M. AUSTIN,

Deputy Register.

30

Deed. D 14.

Emily Neilson	} Deed To The New Jersey Rail Road & Transportation Company	} Dated October 1st, 1868.
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U. S. Rev.

\$3.50

This Indenture made the first day of October in the year One **40** thousand eight hundred and sixty eight.

Between Emily Neilson of the City County and State of New York party of the first part and The New Jersey Rail Road and Transportation Company parties of the second part.

Witnesseth that the said party of the first part for and in consideration of the sum of Thirty five hundred dollars lawful money of the United States of America to her in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged and the said parties of the second part their successors and assigns forever released and discharged from the same by these presents hath granted bargained and sold aliened remised released conveyed and confirmed and by these presents do grant bargain sell alien remise release convey and confirm unto the said parties of the second part and to their successors and assigns forever.

ALL those two certain lots pieces or parcels of land situate lying and being in the Fifth Ward of Jersey City County of Hudson and State of New Jersey being designated as lots numbered Twenty three (23) and Twenty four (24) in block numbered Two hundred and forty nine (249) and colored Yellow on a Map on file in the office of the Clerk of said County of Hudson showing the partition of the land at Pavonia in said Jersey City among the heirs of John B. Coles deceased said lots taken together being bounded and described as follows: Beginning at the southeasterly corner of South Third and Brunswick Streets thence running Easterly along the southerly line of South Third Street one hundred (100) feet thence southerly parallel with Brunswick Street Fifty (50) feet thence westerly parallel with South Third Street One hundred (100) feet to Brunswick Street thence northerly along the easterly line of Brunswick Street Fifty (50) feet to South Third Street the point or place of beginning.

Together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof.

And also all the estate right title interest property possession claim and demand whatsoever as well in law as in equity of the said party of the first part of in or to the above described premises and every part and parcel thereof with the appurtenances To have and to Hold all and singular the above mentioned and described premises together with the appurtenances unto the said parties of the second part their successors and assigns to their own proper use benefit and behoof for ever.

And the said Emily Neilson for herself her heirs executors and administrators doth covenant grant and agree to and with the

said parties of the second part their successors and assigns that the said Emily Neilson at the time of the sealing and delivery of these presents is lawfully seized in her own right of a good absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted bargained and described premises with the appurtenances and hath good right full power and lawful authority to grant bargain sell and convey the same in manner and form aforesaid.

And that the said parties of the second part their successors and assigns shall and may at all times hereafter peaceably and quietly have hold use occupy possess and enjoy the above granted premises and every part and parcel thereof with the appurtenances without any let suit trouble molestation eviction or disturbance of the said party of the first part her heirs or assigns or of any other person or persons lawfully claiming or to claim the same. And that the same now are free clear discharged and unencumbered of and from all former and other grants titles charges estates judgments taxes assessments and incumbrances of what nature or kind soever.

And also that the said party of the first part and their heirs and all and every other person or persons whomsoever lawfully or equitably deriving any estate right title or interest of in or to the hereinbefore granted premises by from under or in trust for them shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part their successors and assigns make do and execute or cause or procure to be made done or executed all and every such further and other lawful and reasonable acts conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part their successors and assigns as by the said parties of the second part their successors or assigns or their Counsel learned in the law shall be reasonably devised advised or required. And the said Emily Neilson her heirs the above described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said parties of the second part their successors and assigns against the said party of the first part and their heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In Witness Whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

EMILY NEILSON (L. S.)

Signed Sealed and Delivered in the presence of
Words "successors" &c substituted for executors & erased
before signing.

EDWIN F. COREY Jun.

10 STATE OF NEW YORK }ss.
New York City and County,

Be it Remembered that on this Fifteenth day of October in
the year One thousand eight hundred and sixty eight before me
Edwin F. Corey Jr a Commissioner for the State of New Jersey
residing in the City of New York personally appeared Emily
Neilson who I am satisfied is the grantor in the within indenture
named and I having first made known to her the contents thereof
she did acknowledge that she signed sealed and delivered the
same as his voluntary act and deed for the uses and purposes
20 therein expressed.

Witness my hand and official Seal.

EDWIN F. COREY Junior
Commissioner

Received in the office & Recorded November 3d, 1868 at
11 3/4 O'clock A. M.

STATE OF NEW JERSEY, }ss.
County of Hudson.

I JOHN J. McMAHON, Register of the County of Hudson, do
30 hereby Certify that the foregoing is a true and correct copy of
a certain Deed as the same is on Record in my Office in Book
178 of Deeds on page 579 &c.

In Testimony Whereof, I have hereunto set my hand and seal
this Sixteenth day of October A. D., 1911.

[L. S.]

JOHN J. McMAHON,
Register.
By C. M. AUSTIN,
Deputy Register.

Deed D 15.

William H. Neilson &
 Caroline his wife
 To
 The New Jersey Rail Road
 & Transportation Company.
 U. S. Rev
 Stamp
 \$3.50

Deed
 Dated
 October 1st, 1868

10

This Indenture made the first day of October in the year One thousand eight hundred and sixty eight.

Between William H. Neilson of the City County and State of New York and Caroline Neilson his wife parties of the first part and The New Jersey Rail Road and Transportation Company parties of the second part.

Witnesseth that the said parties of the first part for and in consideration of the sum of Three thousand and five hundred dollars lawful money of the United States of America to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged and the said parties of the second part their successors and assigns forever released and discharged from the same by these presents have granted bargained sold aliened remised released and discharged from the same by these presents do grant bargain sell alien remise release convey and confirm unto the said parties of the second part and to their successors and assigns forever.

20

ALL those two certain lots pieces or parcels of land situate lying and being in Fifth Ward of Jersey City County of Hudson and State of New Jersey being designated as lots numbered Twenty one (21) and Twenty two (22) in block numbered Two hundred and forty nine (249) and colored Yellow on a map on file in the office of the Clerk of said County of Hudson showing the partition of the land at Pavonia in said Jersey City among the heirs of John B. Coles deceased said lots taken together being bounded and described as follows: Beginning at a point in the easterly line of Brunswick Street distant fifty (50) feet southerly from the southeasterly corner of Brunswick and South Third Streets thence running easterly parallel with South Third Street One hundred (100) feet thence southerly parallel with Brunswick Street Forty five (45) feet to a certain alley way of ten feet in width running through the middle of block parallel

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with and equi-distant from South Third and South Fourth Streets thence running westerly parallel with South Third Street One hundred (100) feet to Brunswick Street thence northerly along the easterly line of Brunswick Street Forty five (45) feet to the point or place of beginning. Together with that part of the said alley way lying between the centre line thereof and the premises herein described. Said alley way having been reserved for the private use of the owners and occupants of said block.

- 10** Together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof.

And also all the estate right title interest dower and right of dower property possession claim and demand whatsoever as well in law as in equity of the said parties of the first part of in or to the above described premises and every part and parcel thereof with the appurtenances.

- 20** To Have and to Hold all and singular the above mentioned and described premises together with the appurtenances unto the said parties of the second part their successors and assigns to their own proper use benefit and behoof for ever.

- And the said William H. Neilson for himself and his heirs executors and administrators doth covenant grant and agree to and with the said parties of the second part their successors and assigns that the said William H. Neilson at the time of the sealing and delivery of these presents is lawfully seized in his own right of a good absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted bargained and described premises with the appurtenances and hath good right full power and lawful authority to grant bargain sell and convey the same in manner and form aforesaid.

- And that the said parties of the second part their successors and assigns shall and may at all times hereafter peaceably and quietly have hold use occupy possess and enjoy the above granted premises and every part and parcel thereof with the appurtenances without any let suit trouble molestation eviction or disturbance of the said parties of the first part their heirs or assigns or of any other person or persons lawfully claiming or to claim the same. And that the same now are free clear discharged and unincumbered of and from all former and other grants titles charges estates judgments taxes assessments and incumbrances of what nature or kind soever.

And also that the said parties of the first part and their heirs and all and every other person or persons whomsoever lawfully or equitably deriving any estate right title or interest of in or to the hereinbefore granted premises by from under or in trust for either of them shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part their successors and assigns make do and execute or cause or procure to be made done or executed all and every such further and other lawful and reasonable acts conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part their successors and assigns forever, as by the said party of the second part their successors or assigns or their Counsel learned in the law shall be reasonably devised advised or required. 10

And the said parties of the first part their heirs the above described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said parties of the second part their successors and assigns against the said parties of the first part and their heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend. 20

In Witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

WM. H. NEILSON (l. s.)
C. K. NEILSON (l. s.)

Signed Sealed & Delivered in the presence of
Words "successors &c" Substituted for executors &c erased
before signing. 30

EDWIN F. COREY Jun.

STATE OF NEW YORK
New York City & County, } ss.

Be it Remembered that on this sixteenth day of October in the year One thousand eight hundred and sixty eight before a Commissioner for the State of New Jersey residing in the City of New York personally appeared William H. Neilson and Caroline K his wife who I am satisfied are grantors in the within indenture named and I having first made known to them the 40

contents thereof they did severally acknowledge that they signed sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

And the said Caroline K. Neilson being by me privately examined separate and apart from her said husband did further acknowledge that she signed sealed and delivered the same as her voluntary act and deed freely and without any fear threats or compulsion of or from her said husband.

EDWIN F. COREY Junior
Commissioner.

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Received in the office & Recorded November 3d 1868 at
11 3/4 O'Clock A. M.

STATE OF NEW JERSEY, }
County of Hudson. } ss.

I JOHN J. McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and corret copy of a certain Deed as the same is on Record in my Office in Book 178 of Deeds on page 576 &c.

In Testimony Whereof, I have hereunto set my hand and seal this Sixteenth day of October A. D., 1911.

[L. S.]

JOHN J. McMAHON,

Register.

By C. M. AUSTIN,

Deputy Register.

Deed D 16.

80

Charles G. Clark

To

The United New Jersey Rail Road
and Canal Company.

Deed
Dated
June 15, 1877.

THIS INDENTURE made the fifteenth day of June in the year one thousand eight hundred and seventy seven.

Between Charles G. Clark (widower) of the City, County and State of New York party of the first part and the United New Jersey Rail Road and Canal Company a Corporation of the State of New Jersey part of the second part.

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Witnesseth that the said party of the first part for and in consideration of the sum of Seventeen hundred and fifty dollars lawful money of the United States of America to him in hand

paid by the said party of the second part at or before the en-sealing and delivery of these presents the receipt whereof is hereby acknowledged and the said party of the scond part forever released and discharged from the same by these presents has granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents does grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and to its successors and assigns forever.

ALL that certain lot, piece or parcel of land, situated in Jersey City, N. J. and which is known as lot numbered twenty five (25) in Block numbered Three hundred and eighty nine (389) on Map of Jersey City made by R. C. Bacot 1861 and more particularly described as follows:

Beginning at a point in the southerly line of South Third (now called Sixth) Street distant one hundred feet easterly from the southeasterly corner of Sixth and Brunswick Street and from thence to run (1) southerly and parallel with Brunswick Street one hundred feet; thence (2) easterly and parallel with Sixth Street twenty five feet; thence (3) northerly and parallel with Brunswick Street one hundred feet to Sixth Street thence (4) westerly along the southerly line of Sixth Street twenty five feet to the place of beginning.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

And also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of in and to the same and every part and parcel thereof, with the appurtenances.

To have and to hold the above granted, bargained and described premises with the appurtenances unto the said party of the second part its successors and assigns to its and their own proper use, benefit and behoof forever.

And the said Charles G. Clark does covenant, grant and agree to and with the said party of the second part its successors and assigns that the said Charles G. Clark at the time of the sealing and delivery of these presents is lawfully seized in his own right of a good, absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted, bargained and described premises with the appurtenances and has good

right full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the said party of the second part its successors and assigns shall and may at all times hereafter peaceably and quietly have, hold, use, occupy possess and enjoy the above granted premises and every part and parcel thereof with the appurtenances without any let, suit, trouble, molestation, eviction or disturbance of the first part his executors, administrators or assigns or of any other person or persons lawfully claiming or to claim the same.

- 10 And that the same now are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind soever. And also that the said party of the first part and his heirs, executors & administrators and all and every other person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of in or to the hereinbefore granted premises by, from under or in trust for him or them shall and will at any time or times hereafter upon the reasonable request and at the proper costs, and charges in the law of the said party of the second part its successors and assigns make do and execute or cause or procure to be made, done and executed all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part its successors and assigns forever as by the said party of the second part its successors or assigns or its counsel learned in the law shall be reasonably devised, advised or required.
- 30 And the said Charles G. Clark his heirs the above described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said party of the second part its successors and assigns against the said party of the first part and his heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In Witness Whereof the party of the first part has hereto set his hand and seal the day & year first above written.

C. G. CLARK (l. s.)

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Signed, sealed and delivered in the presence of Dan'l. Seymour.

City and County of New York, } ss.
 STATE OF NEW YORK,

I, Daniel Seymour, a commissioner for the State of New Jersey residing in the City and County of New York aforesaid do certify that on the twenty-third day of June, 1877, in the said City and County personally appeared before me Charles G. Clark and acknowledged to me that he had signed, sealed and delivered the foregoing Instrument as his voluntary act and deed the contents thereof being by me first made known to him and I further certify that I am personally acquainted with said Charles G. Clark and know him to be the individual described in and who executed the foregoing instrument. 10

In Witness Whereof, I have hereunto set my hand and Official Seal at the City, County and State aforesaid this 23 day of June one thousand eight hundred and seventy-seven.

[t. s.]

DAN'L. SEYMOUR,

A Commissioner for the State of New Jersey.

Received in the office & recorded August 29 A. D. 1877 at 1.30 P. M. 20

STATE OF NEW JERSEY, } ss.
 County of Hudson.

I John J. McMahon, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Deed as the same is on Record in my Office in Book 314 of Deeds on page 500, &c.

In Testimony Whereof, I have hereunto set my hand and seal this Sixteenth day of October A. D. 1911.

[L. S.]

JOHN J. McMAHON, 80

Register.

By C. M. AUSTIN,

Deputy Register.

Deed D 17.

Robert C. Bacot and Mary His Wife To The New Jersey Railroad and Trans-	Deed Dated December 14th, 1868. 40
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portation Company.

THIS INDENTURE made the fourteenth day of December in the year one thousand eight hundred and sixty eight.

Between Robert C. Bacot and Mary his wife of Highland in the County of Bergen and State of New Jersey party of the first part and the New Jersey Railroad and Transportation Company a body corporate of the said State of New Jersey party of the second part.

Witnesseth that the said party of the first part for and in consideration of the sum of Fifty-nine thousand nine hundred dollars lawful money of the United States of America to them in hand paid by the said party of the second part at or before

10 the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and to their successors and assigns forever.

ALL that certain lot or parcel of land and premises, situate, lying and being in the Fifth Ward of Jersey City in the County of Hudson and State of New Jersey.

Beginning at a point in the easterly side of Jersey Avenue 20 distant sixty one feet three inches (61.3) southerly from the southeasterly corner of said Jersey Avenue and South Third Street; thence running easterly at right angles to Jersey Avenue eighty one feet and three inches; thence running southerly and parallel with Jersey Avenue nineteen (19) feet; thence westerly at right angles to Jersey Avenue eighty one feet and three inches to the easterly line thereof; thence running northerly along said easterly line of Jersey Avenue nineteen (19) feet to the place of beginning.

Being the same premises conveyed to the said Robert C. 30 Bacot by Ephriam S. Johnson and wife by deed dated twenty fourth day of September 1868 and recorded in the office of the Clerk of Hudson County October 17th 1868 in Book 176 of Deeds for said County pages 514 &c.

Also all those five certain lots, pieces or parcels of land and premises situate, lying and being in Jersey City aforesaid in Block (201) Two hundred and one as said Block is laid out on a certain map made by Joseph F. Mangin entitled "Map of that part of the Town of Jersey commonly called Aharsimus field in the office of the Clerk of the County of Bergen A. D. 1804 which said lot are now known as lots numbered twenty eight (28) twenty nine (29) thirty (30) thirty one (31) and thirty two (32) in said block and taken together are described as follows:

Beginning at a point in the southerly side of South Third or Hill Street distant one hundred feet westerly from the southwesterly corner of said Street and Jersey Avenue thence running southerly parallel with Jersey Avenue one hundred feet; thence westerly parallel with South Third or Hill Street one hundred and twenty five feet; thence northerly parallel with Jersey Avenue one hundred feet to South Third or Hill Street; thence easterly along the southerly side of South Third or Hill Street, one hundred and twenty five feet to the place of beginning. Subject to five feet in width of an alley or passage way of ten feet in width upon the rear of said lots which alley or passage way runs through the middle of said Block equi-distant between South Third and South Fourth Streets for public and private sewerage, aqueduct and draining purposes and for a common right of way for the private use of the owners or occupants of said Block which passage way is subject to the regulations of the City Authorities. Being the same premises conveyed to the said Robert C. Bacot by John Werden and wife by deed dated the first day of October 1868, and recorded October 17th 1868 in Book 176 of Deeds for Hudson County pages 510 &c. 20

Also all those certain two lots, pieces or parcels of land and premises, situate, lying and being in Jersey City aforesaid and are designated on a map filed in the Office of the Clerk of said County of Hudson showing the partition of land in Jersey City among the heirs of John B. Coles deceased as lots numbered twenty six (26) and twenty seven (27) on Block numbered two hundred and forty nine (249) and colored Red and bounded and described as follows:

Beginning on the southerly side of South Third Street one hundred and twenty five (125) feet easterly from the south-easterly corner of said Street and Brunswick Street; thence running southerly and parallel with Brunswick Street one hundred (100) feet; thence easterly and parallel with South Third Street fifty (50) feet; thence northerly and parallel with Brunswick Street one hundred (100) feet to South Third Street; thence westerly along the southerly side of South Third Street fifty (50) feet to the place of beginning. 30

Being the same premises conveyed to the said Robert C. Bacot by Michael Gallahan and wife by deed dated the fifteenth day of October 1868 and recorded October 17th, 1868 in the office of the Clerk of Hudson County Book 176, page 523 &c. 40

Also all that certain lot, piece or parcel of land and premises situate, lying and being in Jersey City aforesaid bounded and described as follows:

Beginning at a point in the southerly line of South Third — distant one hundred and fifty (150) feet east from the southeast corner of Jersey Avenue and South Third Street; thence running southerly and parallel with Jersey Avenue one hundred (100) feet; thence easterly parallel with South Third Street twenty five (25) feet; thence northerly and parallel with Jersey Avenue one hundred (100) thence westerly along the southerly line of South Third Street feet to the southerly line of South Third Street twenty five (25) feet to the place of beginning.

- 10 And being known as lot number (27) Block 122 on Mangin's Map.

Being the same premises conveyed to the said Robert C. Bacot by Margaret Kalgebehen wife of Charles F. Kalgebehen and the said Charles F. Kalgebehen by deed dated October 15th, 1868 and recorded in the office of the Clerk of the County of Hudson the 17th day of October 1868, in Book 176, of Deeds for said County pages 506 &c.

- Also all that certain lot, piece or parcel of land and premises situate, lying and being in Jersey City aforesaid and described
20 as follows:

Beginning at a point in the easterly side of Jersey Avenue distant forty three feet and nine inches (43 ft 9 in) southerly from the southeasterly corner of said Avenue and South Third Street; thence running easterly at right angles to Jersey Avenue sixty two feet six inches (62 ft 6 in); thence southerly parallel with said Avenue seventeen feet six inches (17 ft 6 in); thence westerly at right angles to Jersey Avenue sixty two feet six inches (62 ft 6 in) to the easterly side of said Avenue; thence northerly along the easterly line of said Avenue seventeen feet
30 six inches (17 ft 6 in) to the place of beginning.

Also all that certain other piece or parcel of land and premises, situate, lying and being in Jersey City aforesaid and described as follows:

Beginning at a point in the easterly line of Jersey Avenue eighty feet and three inches (80 ft 3 in) southerly from the southeasterly corner of said Avenue and South Third Street; thence running easterly and at right angles to Jersey Avenue eighty one feet and three inches (81 ft 3 in.); thence southerly parallel with said Avenue nineteen feet and nine inches (19 ft
40 9 in); thence westerly at right angles to said Avenue eighty one feet three inches (81 ft. 3 in) to the easterly line of said Avenue; thence northerly along the easterly line of said Avenue nineteen feet and nine inches (19 ft 9 in) to the place of beginning.

Also all that certain other strip piece or parcel of land and premises situate, lying and being in Jersey City aforesaid and described as follows:

Beginning at a point in the easterly line of Jersey Avenue distant ninety nine feet and eight inches (99 ft 8 in) northerly from the northeast corner of said Avenue and South Fourth Street; thence running easterly through the centre of a brick wall thirty two feet being parallel with South Fourth Street; thence running northerly parallel with Jersey Avenue four (4) inches thence westerly and parallel with South Fourth Street 10 thirty-two (32) feet to the east line of Jersey Avenue; thence northerly along the easterly line of Jersey Avenue four (4) inches to the place of beginning.

Being the same premises conveyed to the said Robert C. Bacot by Joseph B. Stone and wife by deed dated October 15th 1868 and recorded in the office of the Clerk of Hudson County October 17th 1868, in Book 176 of Deeds pages 518 &c.

Also all that certain other lot and part of lot of land and premises situate, lying and being in Jersey City aforesaid and which taken together may be described as follows:

Beginning at a point in the westerly line of Erie Street distant twenty five feet southerly from the southwesterly corner of Erie and South Third Streets; thence running westerly and parallel with South Third Street sixty (60) feet; thence southerly and parallel with Erie Street twenty five (25) feet; thence westerly parallel with South Third Street forty (40) feet; thence southerly parallel with Erie Street twenty five (25) feet; thence easterly parallel with South Third Street one hundred (100) feet to Erie Street; thence northerly along the westerly line of Erie Street fifty (50) feet to the point or place of beginning.

Being the same premises conveyed to the said Robert C. Bacot by Joseph B. Stone and wife by deed dated October 15th 1868, and recorded in the office of said Clerk of Hudson County October 17th 1868 in Book 176 of Deeds pages 527 &c.

Also all those two certain other lots, pieces or parcels of land and premises situate, lying and being in Jersey City aforesaid in Block two hundred and one (201) as said Block is laid down on said Map made by Joseph F. Mangin of that part of the Town of Jersey commonly called Aharsimus and filed in the office of the Clerk of the County of Bergen A. D. 1804 and which said lots are now known as numbers twenty five (25) and twenty six in said Block and together may be described as follows:

Beginning at a point in the southerly line of South Third Street distant one hundred (100) feet easterly from the south-easterly corner of said Street and Coles Street; thence running southerly and parallel with Coles Street ninety five (95) feet to a certain alley or passage way of ten (10) feet in width running through the middle of said block parallel with and equi-distant from South Third and South Fourth Street thence easterly parallel with South Third Street fifty (50) feet thence northerly and parallel with Coles Street ninety five (95) feet to South
10 Third Street; thence westerly along the southerly side of South Third street fifty (50) feet to the point or place of beginning.

Together with one half of the said passage way adjoining the rear of said lots the use of said passage way being expressly reserved for public and private sewerage, aqueduct and general draining purposes and for a common right of way for the private use of the owners and occupants of said Block.

Being the same premises conveyed to the said Robert C. Bacot by Raymond Roth by deed dated October 31st, 1868 and recorded in the office of said Clerk of Hudson County November
20 3rd 1868, in Book 178 of Deeds for said County pages 596 &c.

Also all that certain piece or parcel of land and premises situate, lying and being in the City of Hudson in the County of Hudson and State of New Jersey bounded and described as follows:

Beginning at a point on the southerly line of Court Street where the easterly line of building owned by one Christian Mathis if produced northerly would intersect the said southerly line of Court Street; thence running easterly along the southerly line of Court Street eighty five (85) feet more or less to the
30 westerly line of Chestnut Avenue thence southerly along said westerly line of Chestnut Avenue one hundred and twenty five (125) feet more or less to the northerly line of property now or formerly owned by Jared W. Graves; thence westerly along the line last mentioned ninety seven feet and six inches (97 ft 6 in) more or less to the easterly line of property of Harvey; thence northerly along said line of Harvey to a point in said line distant southerly two feet at right angles from the southerly line of out houses owned by said Christian Mathis as said out houses now stand; thence easterly and parallel with the southerly
40 line of said out houses and distant two feet northerly therefrom to a point where the easterly line before mentioned of said Mathis buildings intersect the last mentioned line; thence northerly along the said easterly line of said Mathis' buildings to the point of beginning on the southerly side of Court Street.

Being the same premises conveyed to the said Robert C. Bacot by Christian Mathis and wife by deed dated November 5th 1868, and recorded November 6th 1868 in the office of the Clerk of said County of Hudson in Book 176 of Deeds pages 710 &c.

The above lots and parcels of land are conveyed by the party of the first part to the party of the second part subject to all the restrictions and limitations in the said several deeds referred to by which said lots and parcels of land were conveyed to the said Robert C. Bacot. 10

Together with all and singular the tenements, hereditaments and appurtenances hereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders, rents issues and profits thereof.

And also all the estate, right, title, interest, dower right of dower property, possession claim and demand whatsoever as well in law as in equity of the said party of the first part of in or to the above described premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises together with the appurtenances unto the said party of the second part their successors and assigns to their own proper use, benefit and behoof forever. 20

And the said Robert C. Bacot for himself his heirs, executors and administrators doth covenant, promise and agree to and with the said party of the second part their successors and assigns that he has not done, committed, executed or suffered any act or acts thing or things whatsoever whereby or means whereof the above mentioned and described premises or any part or parcel thereof now are or at any time hereafter shall or may be impeached, charged or incumbered in any manner or way whatsoever. Except such mortgages as he said Bacot may have given for or on account of the purchase money for said premises which mortgages are assumed by the party of the second part and they and their successors do agree to and with the said Robert C. Bacot his executors and administrators to pay off and discharge the same. 80

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

ROBERT C. BACOT (L. S.)
MARY BACOT (L. S.) 40

Signed, sealed and delivered in the presence of
U. S. R. Stamp \$60.00 JOHN VAN BRUNT.

STATE OF NEW JERSEY, }
Hudson County, }ss.

Be it remembered that on this sixteenth day of December in the year one thousand eight hundred and sixty eight before me the subscriber a Master in Chancery of New Jersey personally appeared Robert C. Bacot and Mary his wife who I am satisfied are the grantors named in and who executed the within instrument of conveyance and I having first made known to them the contents thereof they did thereupon severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

10 And the said Mary wife of the said Robert C. Bacot being by me privately examined separate and apart from her said husband did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely and without any fear, threats or compulsion of or from her said husband.

JOHN VAN BRUNT,
Master in Chancery.

Received in the office and recorded May 15th A. D. 1869 at
20 1:45 o'clock P. M.

STATE OF NEW JERSEY, }
County of Hudson. }ss.

I JOHN J. McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Deed as the same is on Record in my Office in Book 190 of Deeds on page 705 &c.

In Testimony Whereof, I have hereunto set my hand and seal
30 this Sixteenth day of October A. D., 1911.

[L. S.]

JOHN J. McMAHON,

Register.

By C. M. AUSTIN,

Deputy Register.

Deed D 18.

Robert C. Bacot and Mary, his wife,

To

40 The New Jersey Railroad and Trans-
 portation Company.

Deed
 Dated
 Oct. 5th, 1868.

This Indenture made the Fifth day of October in the year
 One thousand eight hundred and sixty eight.

Between Robert C. Bacot and Mary his wife of Highland in the County of Bergen and State of New Jersey party of the first part And The New Jersey Rail Road and Transportation Company a body corporate of the State of New Jersey party of the second part. Witnesseth that the said party of the first part for and in consideration of the sum of Fifty thousand four hundred dollars lawful money of the United States of America to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged have granted bargained sold aliened remised released conveyed and confirmed and by these presents do grant bargain sell alien remise release convey and confirm unto the said party of the second part and to their successors and assigns forever.

ALL those thirteen lots or parcels of land situate in the Fifth Ward of Jersey City in the County of Hudson and State of New Jersey which on map of that part of the Town of Jersey commonly called Ahersimus made by Joseph F. Mangin and filed in the Clerks office of the County of Bergen A. D. 1804 and known and distinguished as lots numbered twenty six (26) twenty seven 27 twenty eight 28 twenty nine 29 thirty 30 thirty one 31 and thirty two 32 in block numbered two hundred and twenty-five 225 and also as lots numbered one 1 two 2 three 3 four 4 thirty one 31 and thirty two 32 in block numbered two hundred and forty nine 249 each of said lots being twenty five feet wide in front and rear and one hundred feet deep throughout and fronting on the southerly side of South Third Street except said lots numbered 1, 2, 3 and four 4 which front on the westerly side of Monmouth Street being the same premises conveyed to the said Robert C. Bacot by William W. Carson and wife and Thomas G. Carson and wife by deed dated September 14th, 1868 and recorded in the office of the Clerk of Hudson County October 2d A. D. 1868. Also all that certain tract piece or parcel of land situate lying and being in Jersey City aforesaid with the buildings erected thereon bounded and described as follows to wit beginning at a point in the southerly side of South Third Street one hundred feet westerly from the southwesterly corner of Coles and South Third Streets thence southerly and at right angles with South Third Street seventy five 75 feet thence easterly and parallel with South Third Street forty feet 40 one and a half inches 1. ½ thence northerly and at right angles to South Third Street seventy-five feet to the southerly line of South Third Street thence westerly along the

said line forty—40 feet one and one half inches 1. $\frac{1}{2}$ to the place of beginning being the same premises conveyed to the said Robert C. Bacot by Frances King wife of Henry King and Henry King by deed dated October 1st A. D. 1868 and recorded in the office of the Clerk of said County of Hudson October 2nd A. D. 1868.

Also all that certain other lot piece or parcel of land and premises situate lying and being in Jersey City aforesaid commencing at a point in the easterly line of Monmouth Street

- 10 distant southerly fifty five feet from the southerly line of South Third Street thence running easterly parallel with South Third Street one hundred and twenty five feet southerly and parallel with Monmouth Street twenty feet thence westerly parallel with South Third Street to through and beyond a party wall standing partly on the premises hereby conveyed and partly on the premises next adjoining southerly thereto one hundred and twenty five feet to the easterly line of Monmouth Street thence northerly along said line twenty feet to the place of beginning being the same premises conveyed to the said Robert C. Bacot
20 by Charles Stone and wife by deed dated October 1st A. D. 1868 and recorded in the office of the Clerk of Hudson County on the same day.

Also all that other certain lot piece or parcel of land with the buildings erected thereon situate lying and being in Jersey City aforesaid bounded and described as follows to wit beginning at a point in the easterly line of Erie Street distant one hundred (100) feet southerly from the southeasterly corner of South Third and Erie Street thence running easterly and parallel with South Third Street one hundred 100 feet thence northerly and

- 30 parallel with Erie Street twenty five 25 feet thence westerly and parallel with South Third Street one hundred 100 feet to Erie Street thence southerly along the easterly line of Erie Street twenty five 25 feet to the point or place of beginning being the same premises conveyed to the said Robert C. Bacot by Thomas Herbert and wife by deed dated October 1st, A. D. 1868 and recorded in the office of the Clerk of Hudson County October 2nd, A. D. 1868 the above lots and parcels of land are conveyed by the party of the first part to the party of the second part subject to all the restrictions and limitations in the said
40 several deeds referred to by which the said lots and parcels of land were conveyed to the said Robert C. Bacot.

Together with all and singular the tenements hereditaments and appurtenances thereunto belonging or in anywise appertain-

ing and the reversion and reversions remainder and remainders rents issues and profits thereof and also all the estate right title interest dower right of dower property possession claim and demand whatsoever as well in law as in equity of the said party of the first part of in or to the above described premises and every part and parcel thereof with the appurtenances.

To Have and to Hold all and singular the above mentioned and described premises with the appurtenances unto the said party of the second part their successors and assigns to their own proper use benefit and behoof forever.

And the said Robert C. Bacot for himself his heirs executors and administrators doth covenant grant promise and agree to and with the said party of the second part their successors and assigns that he has not done committed executed or suffered any act or acts thing or things whatsoever whereby or by means whereof the above mentioned and described premises or any part or parcel thereof now are or at any time hereafter shall or may be impeached charged or incumbered in any manner or way whatsoever.

In Witness Whereof the said parties of the first part have 20 hereunto set their hands and seals the day and year first above written.

ROBT C. BACOT (L. S.)
MARY BACOT (L. S.)

Signed Sealed and Delivered in the presence of
The word "Highland" on the first line of first page interlined over an erasure before execution.

(U. S. R. Stamp \$50.50)

JOHN VAN BRUNT.

80

STATE OF NEW JERSEY }
Bergen County, } ss.

Be it Remembered that on this fifteenth day of October in the year One thousand eight hundred and sixty eight before me John Van Brunt a Master in Chancery of said State personally appeared Robert C. Bacot. and Mary his wife who I am satisfied are the grantors in the within Indenture named and I having first made known to them the contents thereof, they did each severally acknowledge that they signed sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

AND The said Mary wife of the said Robert C. Bacot. being by me privately examined separate and apart from her said

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husband did further acknowledge that she signed sealed and delivered the same as her voluntary act and deed Freely and without any fear threats or compulsion of or from her said husband.

JOHN VAN BRUNT,

Master in Chancery.

Received in the Office and Recorded October 24th 1868. at
2.25 O'Clock P. M.

10 STATE OF NEW JERSEY, {
County of Hudson. }
s.s.

I, JOHN J. McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Deed as the same is on Record in my Office in Book 175 of Deeds on page 638 &c.

In Testimony Whereof, I have hereunto set my hand and seal
this Sixteenth day of October A. D., 1911.

[L. S.]

JOHN J. McMAHON,
Register.

20

by C. M. AUSTIN,
Deputy Register.

Deed D 19.

Homer Ramsdell and Frances E. L. His Wife. | Deed
To | Dated
William W. Carson and Thomas G. Carson } Feb. 17, 1868.

30 U. S. Rev. Stamp \$200.00)

THIS INDENTURE made this seventeenth day of February in
the year one thousand eight hundred and sixty eight.

Between Homer Ramsdell and Frances E. L. his wife of the
City of Newburgh in the County of Orange and State of New
York of the first part and William W. Carson of the City of
Newburgh N. Y. and Thomas G. Carson of Dalton, Massachu-
setts of the second part.

Witnesseth that the said parties of the first part for and in con-
sideration of the sum of Two hundred thousand dollars to them
in hand paid by the part of the second part at or before the en-
sealing and delivery of these presents the receipt whereof is
hereby acknowledged and the said parties of the second part
their heirs executors, and administrators forever released and

discharged from the same by these presents have granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said parties of the second part and to their heirs and assigns forever.

ALL those certain lots, pieces and parcels of land situate lying and being in the City of Jersey City in the County of Hudson and State of New Jersey and which are known and designated on a map of that part of the Town of Jersey commonly called Aharsimus filed in the Clerk's Office of the County of Bergen 10 A. D. 1804 as lots numbers eighteen (18), nineteen (19), twenty (20) twenty one (21) twenty two (22) twenty three (23) and twenty four (24) on block number one hundred and sixteen (116) on said map. Each of said lots being twenty five feet front and rear by one hundred feet deep and all lying on the east side of Prospect Street between North Seventh and North Eight Streets.

Also all those certain lots known and designated on said map above mentioned as lots numbers seventeen (17), eighteen (18), nineteen (19), twenty (20) twenty one (21) twenty two (22), 20 twenty third (23), twenty four (24) on block number one hundred and seventeen (117) each lot being twenty five feet front and rear and one hundred feet deep and said lots together extending from North Eighth to North Ninth Street and lying on the East side of Prospect Street.

Also all those certain lots known and designated on said map as lots numbers seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty one (21), twenty two (22) twenty three (23), and twenty four (24) on block number one hundred and eighteen (118) said lots being together bounded as follows. 80

Beginning on the south east corner of North Tenth and Prospect Streets and running thence southwardly along the east side of Prospect Street two hundred feet to the north line of North Ninth Street; thence eastwardly along the north line of North Ninth Street one hundred feet; thence northwardly parallel with Prospect Street one hundred feet; thence in a straight line to a point on the south side of North Tenth Street eighty feet distant from Prospect Street and thence westwardly along the south side of North Tenth Street eighty two feet to the place of beginning.

Also all those certain lots, known and designated on said map as lots numbers seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty one (21) twenty two (22) twenty three 40

(23) and twenty four (24) on block number one hundred and twenty (120) which lots together are bounded as follows:—

Beginning at the south east corner of North Twelfth and Prospect Streets and running thence southwardly along the east side of Prospect Street two hundred feet to the north side of North Eleventh Street; thence eastwardly along the north side of North Eleventh Street seventy six feet; thence northwardly one hundred feet to the north east corner of said lot number twenty (20) at a point seventy five feet eastwardly from Prospect Street;

- 10** thence in a straight line to the south side of North Twelfth Street at a point fifty five feet eastwardly from Prospect Street and thence westwardly along the south line of North Twelfth Street fifty five feet to the place of beginning. Also all those certain lots known and designated on said map as lots numbers one (1) two (2), three (3), four (4), five (5), six (6) seven (7) and eight (8) on block number one hundred and forty three (143) each of said lots being twenty five feet front and rear and one hundred feet deep and lying on the west side of Prospect Street between North Tenth Street and North Eleventh Street. Also
20 all those certain lots known and designated on said map as lots numbers one (1), two (2), three (3), four (4), five (5), six (6) seven (7) and eight (8) on Block number one hundred and forty four (144) each of said lots being twenty five feet front & rear by one hundred feet deep and situated on the west side of Prospect Street between North Eleventh and North Twelfth Streets.

Also all those certain lots, known and designated on said map as lots numbers nineteen (19), twenty (20), twenty one (21), twenty two (22), twenty three (23) twenty five (25), twenty six

- 30** (26), twenty seven (27) twenty eight (28) twenty nine (29) thirty (30), thirty one (31) and thirty two (32) on block number two hundred and eight (208) each of said lots being twenty five feet front and rear by one hundred feet deep said lots nineteen (19), twenty (20), twenty one (21), twenty two (22) and twenty three (23) being situate on the east side of Cole Street between North Third Street and North Fourth Street and said lots numbers twenty five (25), twenty six (26) twenty seven (27), twenty eight (28), twenty nine (29) thirty (30), thirty one (31) and thirty two (32) being situated on the south side of North Fourth Street between Coles Street and Jersey Avenue.

Also all those certain lots, known and designated on said map as lots numbers twenty six (26) twenty seven (27), twenty eight (28) twenty nine (29) thirty (30), thirty one (31) and thirty

two (32) on block number two hundred and twenty five (225) each of said lots being twenty five feet front and rear by one hundred feet deep and situated on the south side of South Third between Coles Street and Monmouth Streets.

Also all those certain lots known and designated on said map as lots numbers eleven (11), twelve (12), thirteen (13), fourteen (14), in block number two hundred and twenty six (226) each lot being twenty five feet front and rear by one hundred feet deep and situated on the north side of South Third Street between Coles Street and Monmouth Street. 10

Also lots known and designated on said map as lots numbers one (1), two (2), three (3), four (4) thirty one (31), and thirty two (32) on block number two hundred and forty nine (249) each lot being twenty five feet front and rear by one hundred feet deep said lots together being bounded as follows:—

Beginning at the south west corner of Monmouth and South Third Streets and running thence westwardly along the south side of South Third Street one hundred and fifty feet; thence southwardly parallel with Monmouth Street one hundred feet; thence eastwardly parallel with South Third Street one hundred and fifty feet to Monmouth Street and thence northwardly along the west side of Monmouth Street one hundred feet to the place of beginning. Also all those certain lots known and designated on said map as lots numbers five (5) six (6), seven (7), eight (8) nine (9) and ten (10) in block number two hundred and fifty (250) each of said lots being twenty five feet front and rear by one hundred feet deep said lots together being bounded as follows:— 20

Beginning at the northwest corner of Monmouth and South Third Streets and running thence westwardly along the north side of South Third Street one hundred and fifty feet; thence northwardly parallel with Monmouth Street one hundred feet; thence eastwardly parallel with South Third Street one hundred and fifty feet to the west side of Monmouth Street and thence southwardly along the west side of Monmouth Street to the place of beginning. 30

Also all those certain lots known and designated on said map as lots numbers five (5), six (6), seven (7) eight (8), nine (9) ten (10) eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), twenty nine (29), thirty (30), thirty one (31), and thirty two (32) in block number one hundred and thirty (139) each of said lots being twenty five feet front and rear by one hundred feet deep said lots numbered from five (5) to fifteen (15) both inclusive, being together bounded as follows:— 40

Beginning at the north west corner of Prospect and North Sixth Streets and running thence westwardly along the north side of North Sixth Street two hundred and seventy five feet; thence northwardly parallel with Prospect Street one hundred feet; thence eastwardly parallel with North Sixth Street two hundred and seventy five feet to the west side of Prospect Street and thence southwardly along the west side of Prospect Street one hundred feet to the place of beginning. Said lots numbered twenty nine (29) thirty (30) thirty one (31) and thirty two

10 (32) being situated on the north side of North Seventh Street between Prospect Street and Grove Street.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents issues and profits thereof.

And also all the estate, right, title, interest, dower right of dower, property, possession claim and demand whatsoever as well in law as in equity of the said parties of the first part of in and to the same and every part and parcel thereof, with the appurte-

30 nances. To have and to hold the above granted, bargained and described premises with the appurtenances unto the said parties of the second part their heirs and assigns to their own proper use, benefit and behoof forever.

Subject however to a mortgage upon the said lands and premises now held by the Newark Mutual Benefit Life Insurance Company upon which mortgage there is now secured and unpaid the principal sum of twenty five thousand dollars (and which said principal sum with the interest from the date thereof) the parties of the second part hereby assume and undertake to pay as so much of the consideration money hereinbefore mentioned.

40 And the said Homer Ramsdell for himself his heirs, executors and administrators doth covenant, grant and agree to and with the said parties of the second part their heirs and assigns that the said Homer Ramsdell at the time of the sealing and delivery of these presents is lawfully seized in his own right of a good, absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted and described premises with the appurtenances (subject as aforesaid) and hath good right, full power and lawful authority to grant, bargain, sell and convey the same in manner aforesaid.

And that the said parties of the second part their heirs and assigns shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted

premises and every part & parcel thereof with the appurtenances without any let suit, trouble, molestation, eviction or disturbance of the said parties of the first part their heirs & assigns or of any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature or kind soever (except as aforesaid).

And also that the said parties of the first part and their heirs and all and every other person or persons whomsoever lawfully or equitably deriving any interest, right, title, or estate of in or to the hereinbefore granted premises by from under or in trust for them shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said parties of the second part their heirs & assigns make, do and execute or cause to be made, done and executed all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby granted or so intended to be in and to the said parties of the second part 20 their heirs and assigns forever as by the said parties of the second part their heirs or assigns or their counsel learned in the law shall be reasonably advised or required.

And the said Homer Ramsdell and his heirs the above described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said parties of the second part their heirs and assigns against the said parties of the first part and their heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend. 30

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

HOMER RAMSDELL (l. s.)
FRANCES E. L. RAMSDELL (l. s.)

Sealed & delivered in the presence of,

JNO. C. NOE
Notary Public, Orange County.

The word "forever" interlined and the word "north" in two 40 places written on erasure before execution hereof on the first page hereof. Jno. C. Noe, Notary Public.

U. S. Rev. Stamp 5c

STATE OF NEW YORK, }
 County of Orange, } ss.

Be it remembered that on this seventeenth day of February 1868 before me John C. Noe, a Notary Public in and for said County of Orange personally came Homer Ramsdell and Frances E. L. his wife, known to me to be the grantors in the foregoing conveyance and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses
10 and purposes therein mentioned.

And the said Frances E. L. being by me examined privately and apart from her husband previously acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, freely and without any fear, threats or compulsion of her husband.

Witness my hand and Notarial Seal the day and year above written.

JNO C NOE (SEAL)
Notary Public, Orange County.

20 ORANGE COUNTY } ss.
 Clerk's Office }

I, Lewis Cuddeback, Clerk of said County and the County Court of said County (a Court of Record) do hereby certify that John C. Noe whose name is subscribed to the annexed proof of acknowledgement was at the time of taking the same a Notary Public in and for said County duly appointed and qualified and having full power to take the same and further that I am well acquainted with the handwriting of said Notary and verily believe that the signature subscribed to the said acknowledgement is
80 genuine.

In Witness Whereof, I hereto subscribed my name and affix the seal of said Court and County this seventeenth day of February 1868.

L. CUDDEBACK,

(SEAL) Clerk.

Received in the office & recorded March 5, 1868 at 2 1/2 o'clock P. M.

STATE OF NEW JERSEY, } ss.
40 County of Hudson.

I JOHN J. McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a

certain Deed as the same is on Record in my Office in Book 166 of Deeds on page 4 &c.

In Testimony Whereof, I have hereunto set my hand and seal this Sixteenth day of October, A. D. 1911.

[L. S.]

JOHN J. McMAHON,

Register.

By C. M. AUSTIN,

Deputy Register.

Deed D 20.

10

De Witt Tappan and Margaret His Wife and }
Eliza T. Coles, Widow of John B. Coles Dec'd. }
To }
Bridget Doyle Wife of Michael Doyle }
Deed
Dated
May 12, 1868.

THIS INDENTURE made the twelfth day of January in the year one thousand eight hundred and sixty eight.

Between De Witt Tappan and Margaret his wife and Eliza T. Coles Widow of John B. Coles of Jersey City in the County of Hudson and State of New Jersey parties of the first part and Bridget Doyle wife of Michael Doyle of the same place party of the second part.

20

Witnesseth that the said parties of the first part for and in consideration of the sum of Fourteen hundred and fifty dollars lawful money of the United States of America to them in hand paid by the said party of the second part at or before the sealing and delivery of these presents the receipt whereof is hereby acknowledged and the said party of the second part her heirs, executors and administrators forever released and discharged from the same by these presents have granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and to her heirs and assigns forever. All that certain lot, piece or parcel of land, situate, lying and being in the Fifth Ward of Jersey City, County of Hudson and State of New Jersey and designated on a map filed in the Office of the Clerk of the County of Hudson showing the partition of land in Jersey City among the heirs of John C. Coles, deceased, as lot numbered thirty one (31) on block numbered (250) Two hundred and fifty and colored red and is bounded and described as follows: Beginning on the southerly

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side of South Second Street one hundred and twenty-five (125) feet westerly from the southwesterly corner of said Street and Monmouth Street; thence running southerly parallel to Monmouth Street one hundred feet; thence westerly parallel to South Second Street twenty five (25) feet; thence northerly parallel to Monmouth Street one hundred (100) feet to South Second Street thence easterly along the southerly side of South Second Street twenty five (25) feet to the place of beginning.

Together with all and singular the tenements, hereditaments
10 and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions remainder and remainders rents, issues and profits thereof.

And also all the estate, right, title, interest, dower right of dower courtesy right of courtesy property, possession, claim and demand whatsoever as well in law as in equity of the said parties of the first part of in or to the above described premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises together with the appurtenances unto the said
20 party of the second part his heirs and assigns to his and their own proper use, benefit and behoof forever.

And the said De Witt Tappan and Margaret his wife for themselves their heirs, executors and administrators do covenant grant and agree to and with the said party of the second part her heirs and assigns that the said Margaret Tappan at the time of the sealing and delivery of these presents is lawfully seized in her own right of a good absolute and indefeasible estate of inheritance in fee simple of and in all and singular the above granted, bargained, and described premises with the appurtenances and hath good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid.

And that the said party of the second part her heirs and assigns shall and may at all times hereafter peaceably and quietly have, hold use, occupy, possess and enjoy the above granted premises and every part and parcel thereof, with the appurtenances without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part their heirs or assigns or of any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind soever.

And also that the said parties of the first part and their heirs and all and every other person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of in or to the hereinbefore granted premises by from, under or in trust for them shall and will at any time or times hereafter upon the reasonable request and at the proper costs and charges in the law of the said party of the second part her heirs and assigns make, do and execute or cause or procure to be made, done or executed all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more 10 effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part his heirs and assigns forever as by the said party of the second part his heirs or assigns or his and their counsel learned in the law shall be reasonably devised, advised or required—

And the said parties of the first part for themselves, their heirs, the above described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said party of the second part her heirs and assigns against the said parties of the first part and their heirs and 20 against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

DE WITT TAPPAN	(L. S.)
MARGARET TAPPAN	(L. S.)
ELIZA T. COLES	(L. S.)

Signed, sealed and delivered in the presence of,

STEPHEN MORGAN.

30

U. S. R. Stamp \$1.50.

STATE OF NEW JERSEY, } ss.
Hudson County,

Be it remembered that on this fourteenth day of May in the year one thousand eight hundred and sixty eight before me Stephen Morgan, a Commissioner of Deeds in said County personally appeared De Witt Tappan and Margaret his wife and Eliza T. Coles who I am satisfied are the grantors in the within 40 Indenture named and I having first made known to them the contents thereof, they did thereupon each acknowledge that they

signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

And the said Margaret Tappan being by me privately examined separate and apart from her said husband did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely and without any fear, threats or compulsion of or from her said husband.

STEPHEN MORGAN,

Commissioner of Deeds.

- 10** Received in the office & recorded Jany. 23, 1869 at 9.1/4 O'clock A. M.

STATE OF NEW JERSEY, }
County of Hudson. } ss.

I JOHN J. McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Deed as the same is on Record in my Office in Book 182 of Deeds on page 530 &c.

- In Testimony Whereof, I have hereunto set my hand and seal
20 this Sixteenth day of October, A. D. 1911.

[L. s.]

JOHN J. McMAHON,

Register.

By C. M. AUSTIN,

Deputy Register.

Deed D 21.

- 30** William W. Carson } Deed
To } Dated
Dennis McLaughlin } May 19, 1884.

- THIS INDENTURE made the nineteenth day of May in the year of Our Lord one thousand eight hundred and eighty four between William W. Carson and Julinah R his wife of Newburgh in the County of Orange and State of New York and Thomas G. Carson widower of the City of Boston in the State of Massachusetts party of the first part and Dennis McLaughlin and John M. Shannan of Jersey City in the County of Hudson and State of New Jersey party of the second part witnesseth that the said party of the first part in consideration of Two Thousand Six Hundred and Fifty Dollars to them paid by the party of the second part do hereby bargain sell remise release

give grant and convey unto the said party of the second part their heirs and assigns forever. All those five lots pieces or parcels of land situate in Jersey City in the County of Hudson and State of New Jersey which on a map Entitled Map of that part of the Town of Jersey commonly called "Aharsimus made by Joseph F. Mangin and filed in the Clerk's office of the County of Bergen A. D. 1804 are known and distinguished as lots numbered 5 (Five) 6 (Six) and 7 (Seven) 9 (Nine) and Ten (Ten) in Block number (250) Two hundred and fifty which Block in Bacots map of Jersey City is numbered 390 Three hundred and 10 ninety each of said lots being twenty five feet wide in front and rear and one hundred feet in depth throughout the first three whereof fronting on the Westerly side of Monmouth Street and the last Two of said lots fronting on the Northerly side of the present Sixth Street Being part of the same premises conveyed to the said William and Thomas by Homer Ramsdell and wife by deed dated February 17, A. D. 1868 and recorded in Liber 166 of Deeds for Hudson on pages 4&c said five lots are respectively and similarly numbered in the Block No. 390 on Bacots map aforesaid which map made in the year 1861 was duly filed in the 20 Clerks now Registers office of Hudson County aforesaid.

Together with the hereditaments and appurtenances thereunto belonging also all the estate right title interest dower right of dower of the party of the first part in and to the same.

TO HAVE AND TO HOLD the same unto the party of the second part their heirs and assigns to them and their own use forever.

AND the said William W. Carson and Thomas G. Carson do for themselves their heirs executors and administrators jointly and severally covenant with the party of the second part their heirs and assigns that the said William W. Carson and Thomas 30 G. Carson are seized of said lands in fee simple and have good right so to convey the same.

And that the party of the scond part their heirs and assigns shall and may at all times hereafter peaceably have hold and use the same without any lawful eviction or disturbance.

And that the said lands are free from any encumbrances and the party of the first part their heirs and assigns will execute to the party of the second part their heirs or assigns at each or their request and cost any further conveyances necessary or proper or advised by Consul to vest said lands in fee in each other. 40

AND that the said William W. Carson and Thomas G. Carson and their heirs will warrant secure and forever defend the said lands to the party of the second part their heirs and assigns against all lawful prior claims whatever.

In Witness whereof the party of the first part have hereunto set their hands and seals the day and year first above written.

WILLIAM W. CARSON (L. S.)

JULINAH R. CARSON (L. S.)

THOS. G. CARSON (L. S.)

Signed sealed and delivered in the presence of CHAS E. CORWIN as to WM. W. CARSON and Julinah R. Carson.

SAM'L JENNISON as to T. G. C.

10 STATE OF NEW YORK, }
County of Orange }ss.

I CHARLES E. CORWIN a Notary Public in and for said County do certify that on the twenty seventh day of May A. D. 1884 before me William W. Carson and Julinah R. his wife who I am satisfied are the Grantors mentioned in the within deed and to whom I first made known the contents thereof that thereupon they acknowledged that they signed sealed and delivered the same as their voluntary act and deed. AND that the said Julinah R. did on a private examination apart from her said husband before

20 me also acknowledge that she had done so freely without any fear threats or compulsion of her husband.

CHARLES E. CORWIN

Notary Public in and for Orange County, N. Y.

STATE OF NEW YORK, }
Orange County, Clerks Office }ss.

I Robert B. Hock Clerk of Orange County and also Clerk of the County Court of said County and one of the Clerks of the Supreme Court of said State (Courts of Record) Do Hereby certify that Charles E. Corwin whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written was at the time of taking such proof and acknowledgment a Notary Public in and for said County duly commissioned and sworn and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for lands tenements or hereditaments in said State. AND further that I am well acquainted with the hand writing of such Notary Public and verily believe that the signature to said certificate of proof or acknowledgment is genuine

40 In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Court and County the 27th day of May 1884.

R. B. HOCK, Clerk (Seal)

STATE OF MASSACHUSETTS, }
County of Suffolk, } ss.

I Samuel Jennison a Commissioner for the State of New Jersey residing in Boston do Certify that on the twenty ninth day of May A. D. 1884 before me came in said Boston Thomas G. Carson who I am satisfied is one of the Grantors mentioned in the annexed instrument in writing and to whom I first made known the contents thereof That thereupon he acknowledged that he had signed sealed and delivered the same as his voluntary act and deed. In Witness whereof I have hereunto set my hand and 10 official seal the day and year aforesaid.

SAMUEL JENNISON,

[SEAL] *A Commissioner for the State of New Jersey.*

Recd. in this office and Recrd. June 2nd, 1884, at 1.30 P. M.

STATE OF NEW JERSEY, } ss.
County of Hudson. }

I JOHN J. McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Deed as the same is on Record in my Office in Book 391 20 of Deeds on page 373 &c.

In Testimony Whereof, I have hereunto set my hand and seal this sixteenth day of October A. D., 1911.

JOHN J. McMAHON,

[L. S.]

Register.

By CHARLES M. AUSTIN,
Deputy Register.

Deed D 22

31

Blk Nos. 1085
 1106 1080 1098
 1091 1071 1074
 and 1092

Alfred Neilson et al Defts }
 By M. C. C. } Deed
 To } Dated
 Frank J. Mathews } July 5, 1895

This Indenture made the fifth day of July eighteen hundred 40 and ninety five.

Between William G. E. See one of the Special Masters in Chancery of the State of New Jersey party of the first part.

And Frank J. Mathews of Jersey City Hudson County New Jersey party of the second part.

Witnesseth that whereas by a certain degree of chancery of New Jersey in a cause therein depending wherein Charles F. Coles and wife are complainant and Alfred Neilson and others are defendants bearing date the eighteenth hundred and ninety five it was among other things ordered adjusted and decreed that all and singular the premises in said decree particularly set forth described-of which the premises hereinafter described are a part

- 10 with the appurtenances should be sold either at public or private sale to the highest bidders in the presence and under the direction of William G. E. See, one of the Special Masters of the said Court in such portions as to him might seem most for the interests of the parties and that in case of public sale he should give public notice of the time and place of such sale and in all respects conduct the same according to the provisions of the Statute in such case made and provided and that the said Master should forthwith after such sale make report to the said court and after his report should have been confirmed by the said Court should make
20 execute and deliver to the purchaser or purchasers of said lands and premises good and sufficient conveyances in the law therefor upon their complying with the conditions of such sale and that such sale and conveyance or conveyances duly executed as aforesaid should be valid and effectual forever and should operate as an effectual bar both at law and in equity against the parties complainant and defendant in the said cause and all persons claiming by from or under them or any of them.

- And Whereas to the end that a sale of said lands and premises described in the said decree should be made at public vendue pursuant to the said decree the said William G. E. See Special Master as aforesaid by public advertisements signed by himself and set up at five or more public places in the County of Hudson one whereof was in each of the Aldermanic districts in said City of Jersey City in which said Real Estate is situate at least four weeks next before the time appointed for selling the same and also published in the Evening Journal and the Jersey City News two of the newspapers printed and published in the said County of Hudson (both of which are printed and published at the County seat of said County) at least four weeks successively once in each
30 week next preceding the said time did give public notice of the time and place when and where the said lands and premises would be exposed to sale at public vendue and the said Master at the time and place so appointed that is to say on Tuesday the twenty

fifth day of June eighteen hundred and ninety five at one O'clock in the afternoon at St. Michaels Hall southwest corner of Erie and Tenth Streets Jersey City in the said County of Hudson and by daily adjournments on the two succeeding days did expose the said lands and premises to sale at public vendue to the highest bidders and the said Frank J. Mathews then and there bidding for the lands and premises hereinafter particularly described the sum of Eighty five hundred and fifty dollars and no one bidding so much for the same the said lands and premises hereinafter particularly described were then and their struck off and sold to 10 the said Frank J. Mathews at the price aforesaid the highest bidder for the same.

And Whereas the said William G. E. See Special Master as aforesaid did make his report of sale to the said Court of Chancery which said report was by an order of that Court made on the third day of July Eighteen hundred and ninety five duly confirmed and the said Master was thereby ordered to make execute and deliver to the purchaser of the said real estate or their assigns in compliance with the aforesaid decree good and sufficient conveyances in the law for the said land and real estate purchased by them as aforesaid upon their complying with the conditions of said sale. 20

Now this indenture Witnesseth that the said William G. E. See Special Master as aforesaid by virtue of the premises and for and in consideration of the sum of Eighty five hundred and fifty dollars lawful money of the United States of America to him in hand paid the receipt whereof is hereby acknowledged has granted bargained and sold and by these presents does grant bargain sell and convey unto the said Frank J. Mathews his heirs and assigns. 30

All those four certain lots or parcels of land situate in Jersey City County of Hudson and State of New Jersey known on a map of lots parts of lots and parcels of land situate in Jersey City showing the partition of the same among the heirs of John B. Coles deceased made by Robert C. Bacot Stephen Garretson and Charles G. Sisson Commissioners filed in the office of the Clerk (now in the office of the Register) of said County of Hudson October 24, 1861 as lots numbers twenty nine (29) thirty (30) thirty one (31) and thirty two (32) in block one hundred and eighty eight (188) which lots taken together may be described as follows:— 40

Beginning at a point in the southerly line of Sixteenth Street (formerly North Eighth Street) distant two hundred (200) feet

westerly from the intersection of the westerly line of Erie Street with the southerly line of Sixteenth Street thence southerly parallel with Erie Street one hundred (100) feet thence easterly parallel with Sixteenth Street one hundred (100) feet thence northerly parallel with Erie Street one hundred (100) feet to the southerly line of Sixteenth Street thence westerly along the southerly line of Sixteenth Street one hundred (100) feet to the point of beginning.

Also all those four certain lots which on said map are known
10 as lots numbers five (5) six (6) seven (7) and eight (8) in block number two hundred and seventy five (275) which lots taken together may be described as follows. Beginning at the point formed by the intersection of the westerly line of Brunswick Street with the northerly line of Twelfth Street thence westerly along the northerly line of Twelfth Street one hundred (100) feet thence northerly parallel with Brunswick Street one hundred (100) feet thence easterly parallel with Twelfth Street one hundred (100) feet to the westerly line of Brunswick Street thence southerly along the westerly line of Brunswick Street one hundred (100) feet to the point of beginning.

Also all those four certain lots which on said map are known as lots numbers Nine (9) Ten (10) Eleven (11) and Twelve (12) in block number one hundred and eighty seven (187) which lots taken together may be described as follows:—Beginning at a point in the northerly line of Fourteenth Street (formerly North Sixth Street) distant one hundred (100) feet westerly from Erie Street thence northerly parallel with Erie Street one hundred (100) feet thence westerly parallel with Fourteenth Street one hundred (100) feet thence southerly parallel with Erie Street one hundred (100) feet to Fourteenth Street thence easterly along Fourteenth Street one hundred (100) feet to the point of beginning.

Also all those three certain lots which on said map are known as lots numbers eighteen (18) nineteen (19) and twenty (20) in block number Two hundred and seventy (270) which lots taken together may be described as follows. Beginning at a point in the easterly line of Division Street twenty five (25) feet northerly from the northerly line of Eighth Street (formerly South First Street) thence running easterly parallel With
40 Eighth Street one hundred (100) feet thence northerly parallel with Division Street seventy five (75) feet thence westerly parallel with Eighth Street one hundred (100) feet to the easterly line of Division Street thence southerly along the easterly

line of Division Street seventy five (75) feet to the point of beginning.

Also all those four certain lots which on said map are known as lots numbers seventeen (17) eighteen (18) nineteen (19) and Twenty (20) in block number Two hundred and fifty (250) which lots taken together may be described as follows:—Beginning at a point formed by the intersection of the northerly line of Sixth Street (formerly South Third Street) with the easterly line of Brunswick Street thence easterly along the northerly line of Sixth Street one hundred (100) feet thence northerly 13 parallel with Brunswick Street one hundred (100) feet thence westerly parallel with Sixth Street one hundred (100) feet to the easterly line of Brunswick Street thence southerly along the easterly line of Brunswick Street One hundred (100) feet to the point of beginning.

Also all those two certain lots which on said map are known as lots numbers Twenty five (25) and twenty six (26) in block number Two hundred and nine (209) which lots taken together may be described as follows: Beginning at a point in the southerly line of Thirteenth Street (formerly North Fifth Street) 20 distant one hundred (100) feet easterly from the intersection of the easterly line of Coles Street with the southerly line of Thirteenth Street thence southerly parallel with Coles Street one hundred (100) feet thence easterly parallel — Thirteenth Street fifty (50) feet thence northerly parallel with Coles Street one hundred (100) feet to the southerly line of Thirteenth Street thence westerly along the southerly line of Thirteenth Street fifty (50) feet to the point of beginning.

Also all those three certain lots which on said map are known as lots numbers Twenty five (25) twenty six (26) and twenty seven (27) in block number Two hundred and ten (210) which lots taken together may be described as follows:—Beginning at a point in the southerly line of Fourteenth Street (formerly North Sixth Street) distant one hundred (100) feet easterly from the intersection of the easterly line of Coles Street with the southerly line of Fourteenth Street thence southerly parallel with Coles Street one hundred (100) feet thence easterly parallel with Fourteenth Street seventy five (75) feet thence northerly parallel with Coles Street one hundred (100) feet to the southerly line of Fourteenth Street thence westerly along the southerly line of Fourteenth Street seventy five (75) feet to the point of beginning.

Also parts of all those four certain lots which on said map are

known as lots numbers Twenty one (21) twenty two (22) twenty three (23) and twenty four (24) in block number Two hundred and sixty eight (268) which lots taken together may be described as follows:—Beginning at a point in the southerly line of Seventh Street (formerly South Second) Street fifty (50) feet easterly from the easterly line of Division Street thence southerly parallel with Division Street one hundred (100) feet thence easterly parallel with Seventh Street fifty (50) feet thence northerly parallel with Division Street one hundred (100) feet to the southerly line of Seventh Street thence westerly along the southerly line of Seventh Street fifty (50) feet to the place of beginning. Including the estates and interests in dower of the defendants Catharine B. Neilson widow of John Neilson deceased and Fanny W. Tappan widow of Eugene Tappan deceased and also the inchoate rights of dower of the several defendants as mentioned in said decree.

Together with all and singular the hereditaments and appurtenances to the said premises belonging or in anywise appertaining. To Have and to Hold the said lands hereditaments and appurtenances to the said Frank J. Mathews his heirs and assigns to his and their only proper use benefit and behoof forever according to the true intent and meaning of the said decree and proceedings above mentioned and the acts of the legislature of the State of New Jersey in such case made and provided.

In Witness Whereof the said William G. E. See Special Master as aforesaid has hereto set his hand and seal the day and year first above written.

WM. G. E SEE (SEAL)
Special Master &c

80 Signed Sealed and Delivered in presence of

W.M. F. MIDLIGE.

STATE OF NEW JERSEY, } ss.
County of Hudson,

Be it Remembered that on this Fifteenth day of July Eighteen hundred and ninety five before me the subscriber a Master in Chancery of New Jersey personally appeared William G. E. See Special Master in Chancery of New Jersey who I am satisfied is the grantor in the foregoing deed of conveyance named and I having first made known to him the contents thereof he thereupon acknowledged that he signed sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

WM. F. MIDLIGE Master &c.

STATE OF NEW JERSEY }
Hudson County. }
 ss.

I, William G. E. See Special Master in Chancery of New Jersey do solemnly swear that the real estate described in this deed made by me to Frank J. Mathews was by me sold by virtue of a good and subsisting decree as is therein recited that the time and place of the sale of the said land and real estate was by me duly advertised as required by law and that the same was cried off and sold to a bona fide purchaser for the best price that could be obtained.

10

WM. G. E. SEE.

Sworn before me the subscriber a Master in Chancery of New Jersey on this Fifteenth day of July Eighteen hundred and ninety five and I having examined the deed above mentioned do approve the same and order it to be recorded as a good and sufficient conveyance of the land and real estate therein described.

WM. F. MIDLIGE.

Master &c.

Rec'd in t'le office and Recorded Aug 6, 1895 @ 3 P. M. No. 20
 3393.

STATE OF NEW JERSEY, }
County of Hudson. }
 ss.

I JOHN J. McMAHON, Register of the County of Hudson, do hereby Certify that the foregoing is a true and correct copy of a certain Deed as the same is on Record in my Office in Book 628 of Deeds on page 239 &c.

In Testimony Whereof, I have hereunto set my hand and seal this Sixteenth day of October A. D., 1911. 80

JOHN J. McMAHON,

Register.

[L. S.]

By CHARLES M. AUSTIN,
Deputy Register.

District Court of the United States for the District of New Jersey.

THE ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA,
Plaintiff,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

Stipulation.

It is hereby stipulated by and between the respective parties hereto, that the foregoing is a correct transcript of the record of the United States District Court in the above entitled cause for the purposes of the appeal, with the exception hereinafter mentioned, and that the said transcript may be certified by the Clerk as the record on this appeal.

Said exception is that counsel for the defendant insists that the matters set forth on page 331 of the transcript and entitled "Objection to form of Final Decree" is not properly a part of the record, and reserves the right to so insist at the argument.

Counsel for the complainant agrees that the second paragraph in said paper printed on page 331 as aforesaid, shall not be construed as an objection to the fact that no written opinion has as yet been filed, or that the said Court did not put his announcement of his findings in the cause in writing.

March 20, 1913.

FRANK M. HARDENBROOK,

Attorney for Plaintiff.

VREDENBURGH, WALL & CAREY,

Attorneys for Defendant.

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1913.

No. 1734 (List No. 47).

THE ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY
CITY, Appellant,

vs.

PENNSYLVANIA RAILROAD COMPANY, Appellee.

And afterwards, to wit, on the fourth day of April, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-fifth day of August, 1913, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1913.

No. 1734.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, Appellant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Appellee.

Appeal From the District Court of the United States for the District
of New Jersey.

Before Gray, Buffington and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

This is an appeal from a decree of the court below, dismissing a bill in equity, asking for an injunction and an award of damages. The bill of complaint alleges that complainant is a religious corporation and has been active as such since 1884, upon the lands and premises described in the bill.

That the defendant was incorporated in 1846 as a common carrier, with authority to lease, hold, and operate a line of railway in the States of Pennsylvania and New Jersey,

"and as such, at all the times hereinafter mentioned, has maintained and operated, and still maintains and operates a railroad, with its main and side tracks, locomotives, freight and passenger cars, upon what is known as Sixth Street, in Jersey City, Hudson County, New Jersey."

That on the 20th day of September, 1884, the complainant became the owner of three lots in Jersey City, County of Hudson, and State of New Jersey, fronting on the westerly side of Monmouth Street. (No map of the premises having been presented on either side, we assume that Monmouth Street runs at right angles to Sixth Street, and that the lots in question are situate in a block bounded on the south by Sixth Street, on the east by Monmouth Street, on the north by Seventh Street, and on the west by Brunswick Street.) How far these lots were from Sixth Street, nowhere appears. That immediately thereafter, it caused to be erected thereon, at a large cost, a church edifice, since which time it has held continuously religious services therein.

That on the 10th day of May, 1893, complainant became the owner of a lot of land in the said city of Jersey City, situate on the north side of Sixth Street, 100 feet west from the northwest corner of Sixth and Monmouth Streets, and in the same block as the aforementioned lot. That complainant caused to be erected thereon, at a large cost, a residence for the officiating priests attached to and connected with said church, since which time, the same has been continuously occupied as a home by said priests.

That on June 11, 1898, complainant became the owner of four certain lots of land in said city, and in the same block as the lots above referred to, fronting on Brunswick Street 100 feet, but how far from Sixth or Seventh Street does not appear. That immediately thereafter, complainant caused to be erected thereon a parochial school for educational purposes, since which time the same has been continuously used as a school for upwards of 1100 children.

That on August 8, 1902, complainant became the owner of a lot of land on the northerly side of Sixth Street, in said city, in the same block as the lots aforementioned. That immediately thereafter, it caused to be erected thereon an addition to the residence of the officiating priests connected with complainant's said church.

That on March 20, 1905, complainant became in like manner the owner of a lot of land on the southerly side of Seventh Street, in the said city, in the same block as the aforementioned lots, and that immediately thereafter it caused to be erected thereon at large expense, a home and residence for the sisters and female teachers connected with said church and school; since which time, it has been continuously so used and occupied.

That the buildings so erected are of substantial and costly construction, and, except for the acts of the defendant complained of, convenient, pleasant and healthful, and adapted and used for the respective purposes aforesaid; and that the immediate neighborhood has long been and now is thickly populated and exclusively a residential one.

That the said defendant, for upwards of six years last past, in the operation of its said railroad, has maintained and operated upon said Sixth Street, and immediately to the south of said lands and premises and structures of complainant, a line of railroad track, upon which it operates a great number of freight and passenger trains, cars, switches, engines and locomotives, which continuously, at all hours of the day and night, pass upon said tracks, each making its characteristic noises which locomotives attached to said trains, are now burning, and for upwards of the past six years have continuously burned, vast quantities of what is known as soft or bituminous coal, and from the burning and partial combustion of which there arises, and continuously for upwards of the past six years there has arisen, large and dense volumes of black smoke, soot, cinders, carbon, ashes, particles of unconsumed coal, coal dust and noxious, unwholesome gases, offensive odors and vapors, which are carried to, over, into, upon and through the lands, premises and structures of complainant so owned, used and occupied by it as aforesaid; by reason of which, the buildings of said complainant are seriously injured and their use, for the purposes aforesaid, seriously interfered with, to the great inconvenience and discomfort of those occupying said buildings and worshiping in said church.

The bill then charges that the said acts of the defendant have taken from the complainant property, consisting of the easement of light and air, and deprives it of the same without due process of law and without just compensation, or any compensation whatever,

"and that such acts of the defendant in such interference with and appropriation of said property of your orator, has been and now is a violation of the provisions of the Constitution of the United States."

The bill then avers that the aforesaid acts, use, occupation of and appropriation by the defendant, as aforesaid, constitute and are a nuisance and of special injury to the complainant,

"and are unnecessary, avoidable and unreasonable, and not necessarily connected with the construction or a reasonable operation of said railroad, and which acts are continuous and will cause great and irreparable loss to your orator and subject your orator to the prosecution of a multiplicity of suits for damages, unless the defendant be restrained by injunction from the commission thereof."

The bill then concludes with the averment that the complainant is remediless in the premises, under and by the strict rules of the common law, and can only have relief in a court of equity. The bill therefore prays that defendant may be deemed to pay to complainant the sum of \$50,000—damages suffered by it, by reason of the premises, and that there be granted to complainant

"a writ of injunction, commanding the said defendant, its agents, servants and employés, to absolutely desist and refrain from so operating its said railroad locomotives and engines as to cause or permit black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives, to fall upon or enter into the premises and structures of your said orator, in such appreciable quantity as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the same by your orator, and the priests connected therewith and persons using the said respective structures of your orator."

The bill then concludes with a prayer for a subpoena and answer by the defendant, without oath.

The answer of the defendant denies that it had ever maintained or operated a railroad on Sixth Street in Jersey City.

It alleges that, as lessee, it has maintained and operated, since 1871, an elevated railroad, with five tracks, on the duly authorized right of way of the United New Jersey Railroad and Canal Company, on land between Fifth and Sixth Streets, but not on any part of Sixth Street.

The defendant, further answering, avers that the Legislature of the State of New Jersey, by an act entitled "An Act to Incorporate the New Jersey Railroad and Transportation Company," passed March 7, 1832, created a body politic and corporate, to exercise all the powers and privileges pertaining to corporate bodies and necessary for the purposes of said act with all the rights and powers necessary to the construction of a railroad, with as many sets of tracks as they may deem necessary, from a point in the city of New Brunswick to a point in the Hudson River, opposite the city of New York, and to take possession of lands needed for the site of

the said road, and to acquire the same by purchase or condemnation, in fee simple, and to charge and collect tolls, &c.

That immediately after the passage of said act, the said New Jersey Railroad and Transportation Company surveyed and filed the route of their railroad from the city of New Brunswick to Jersey City, opposite the city of New York, and acquired the land and constructed a railroad thereon, in accordance with the terms of the act, and in September, 1834, opened said railroad as a public highway for the transportation of property and persons, and maintained and operated said railroad up to the time of the execution of the lease thereafter mentioned.

That the State of New Jersey, by an act entitled "An Act to Enable the United Railroad and Canal Companies to Increase Their Depot and Terminal Facilities at Jersey City," approved March 30, 1868, empowered the said New Jersey Railroad and Transportation Company, and the United Delaware and Raritan Canal Company, and the Camden and Amboy Railroad and Transportation Company, to acquire from the State the land under water in Harsimus Cove, in Jersey City, lying between tide water mark on the west, the deep water of the Hudson River on the east, the centre of South Second Street on the north, and the centre of South Seventh Street on the south, in the name of the New Jersey Railroad and Transportation Company, and to fill up and improve the same, by erecting wharves, piers, car and engine houses, and other buildings, and to build a branch railroad, not exceeding 100 feet in width, from said property, so purchased as aforesaid, to some point in the present line of the New Jersey Railroad, eastward of the deep cut in Bergen Hill, with as many separate tracks and rails as shall be deemed necessary. With power to procure the right of way for such branch railroad, either by purchase or by condemnation, in the manner prescribed by the original charter, and to construct the same as an elevated railroad, so as to pass over the streets of said city at least 12 feet in the clear above the same, in consideration of a sum of money to be paid out by said companies to the State of New Jersey, the amount of which was to be ascertained by the Attorney General and three commissioners to be appointed by the Supreme Court. Subsequently, and agreeably to such an ascertainment, the New Jersey Railroad and Transportation Company and the other companies paid to the State of New Jersey the sum of \$500,000, and thereafter made a survey of its said branch line and filed the route thereof in accordance with law, and at great expense acquired from the owners thereof, for the purpose of such branch railroad, as provided by said act, a route 100 feet wide from a point in the New Jersey Railroad, in the deep cut in Bergen Hill, to said lands in Harsimus Cove, and constructed and built on said route the elevated branch road authorized by the act; that thereafter, the companies erected on the said lands in Harsimus Cove a terminal yard in connection with said branch railroad, with wharves, sheds, and a grain elevator, warehouses and tracks, all at great expense. That the defendant commenced to operate the said branch railroad and said terminal yard on or about the first day of May, 1872, with

the full knowledge of and without objection from the owners of any of the lands set forth in the bill of complaint.

That on or about the 30th day of June, 1871, the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company (commonly called the United Railroad and Canal Companies), by indenture bearing date that day, did grant and demise unto the Pennsylvania Railroad Company, the defendant, all their railroads and appurtenances, and real and personal property, including the said Harsimus Cove property and the said branch line leading thereto, for the full term of 999 years. That said lease was validated and confirmed between the companies and the Pennsylvania Railroad Company, by an act of the Legislature of the State of New Jersey, approved March 27, 1873.

That defendant has been in possession of the property so leased, including the said land at Harsimus Cove and the said branch line from Harsimus Cove to the main line from the Bergen Cut, as lessee thereof, since the year 1871, and is now in such possession under said lease, and has been during all that time and still is using and operating the same for the transportation of goods and passengers in and across the State of New Jersey, from the city of Philadelphia to the city of New York.

That the land for the said route to Harsimus Cove was acquired by the New Jersey Railroad and Transportation Company, prior to the year 1873, in accordance with the terms of their said charter, and that some of the persons from whom they acquired said land were at that time also the owners of the lands set forth in the bill of complaint, and that the said lands were granted to the said New Jersey Railroad and Transportation Company by said owners for use in operating and maintaining a railroad thereon, in the way and in the manner in which said railroad is now maintained and operated and that from the year 1873 up until the present time, the defendant has, by force of the franchises above mentioned, derived from the above mentioned public grants, maintained and operated its railroad and run its trains along said route, doing no more damage to the lands adjacent to said route than that which incidentally and necessarily results from the transaction of such acts and business.

The answer also avers that the defendant has, for over 30 years, and since the said legislative grant, had actual possession of the lands on said route uninterruptedly, and has uninterruptedly continued to operate their trains, cars, switch engines and locomotives over the said railroad on said route, in the same way and manner as they now maintain and operate the same, and that there has been acquired, both by statute and prescription, the right so to do.

And defendant finally denies that it has in any wise infringed upon the rights of the complainant, as alleged in the said bill of complaint.

These allegations of the answer, for the most part, especially those in regard to the legislative history and operation of the railroad

during the period since 1871, are not denied, and from the answer and evidence, we may also take, as undisputed, the following facts:

In 1887, an embankment 100 feet wide, with stone retaining walls on each side, was substituted for the trestle. The top of this embankment is generally 18 feet above the level of Sixth Street. The whole of the embankment is to the south of Sixth Street, and of the tracks on the embankment, no portion of the same, or of the embankment, is located on that or any other street, but entirely on the land or right of way of the defendant company.

There has been no change in the number of tracks on this embankment since 1887.

From 1873 to 1905, the use of these tracks in transportation increased, but since 1905, has remained stationary.

The locomotives by which the trains are moved have always burned bituminous coal, from the burning of which characteristic smoke arose from the smoke stack, and the cinders and dust forming this smoke were carried from this right of way to the adjacent land in different directions and different distances, depending upon the force and direction of the wind. The church of complainant fronts on Monmouth Street, not on Sixth Street. A four-story brick building, 25 feet in width, neither owned by nor in possession of the complainant, intervenes between the church property and Sixth Street. All other property within an equal distance from the railroad, must be similarly affected by the operation of the same.

It is also admitted that, owing to the nearness of this portion of the branch road to the freight terminal at Harsimus Cove, the road having been built to connect the said Harsimus Cove with the main line at Bergen Cut, the tracks on the south side of Sixth Street, between Monmouth and Brunswick Streets, are much occupied by shifting engines and in the making up of trains, incident to terminal operations.

It is admitted that no portion of the railroad is on Sixth Street, as alleged in the bill of complaint, but is situated on a strip of land 100 feet wide, south of Sixth Street and running parallel therewith, and we shall consider the bill as if amended in that important respect.

The charge of the complainant, as set forth in its bill, is two-fold:

(1) That the acts of the defendant have taken from the complainant its property, consisting of the easement of light and air to which it is legally entitled, and deprives it of the same without due process of law and without just compensation, or any compensation whatever, in violation of the Constitution of the United States.

(2) That the aforesaid acts, use, occupation of and appropriation by the defendant, as aforesaid, constitute and are a nuisance of special injury to complainant, and are unnecessary, avoidable, and unreasonable, and not necessarily connected with the construction of a reasonable operation of the said railroad.

The latter paragraph seems to suggest, although it does not charge, negligent management by the defendant of its locomotives, and that the injury complained of was the result of such negligence.

On page 66 of his brief, counsel for complainant says: "While this action is not based upon any allegation of negligence, yet the acts of nuisance of which the plaintiff complains are due to negligence." On page 70 of his brief, complainant's counsel makes the following statement: "The allegations of the plaintiff's bill, that the acts of the defendant are unreasonable and unnecessary, do not charge that they are negligently done, as they may have been committed after the exercise of all the care and caution possible."

On this ground, he distinguishes the present case from the case of Bunting vs. Pennsylvania Railroad Co., saying that that was an action based entirely upon negligence, which, being alleged, it became the duty of the plaintiff to establish, and in failing to do this, the plaintiff did not make out a case. So also on this ground, the present case is distinguished, by counsel for the complainant, from Jenkins vs. Pennsylvania R. R. Co., 67 N. J. L. 331, in which the action at law was brought against the defendant company for negligently operating its locomotives in such manner as to cause them to emit smoke denser and greater in volume than was reasonably required for the proper operation of the railroad.

These positions of the complainant are somewhat confusing, as a number of pages of its brief are devoted to showing that the defendant was guilty of negligence in its use of bituminous coal, and in so firing its engines as to produce more smoke than was necessary for the proper operation of the road.

But the gravamen of complainant's argument rests on two propositions:

First, that the emission of smoke from the engines of the defendant, while operating its road on its own land, parallel with Sixth Street and in the block between Brunswick and Monmouth Streets, in such quantities as to enter into and upon complainant's premises, constituted of itself an actionable nuisance and a taking and appropriation of the complainant's property, to wit, its easement of light and air without due process of law and without compensation, in violation of the Constitution of the United States and of the State of New Jersey in that behalf.

Second, that the complainant is entitled to an award of damages and to an injunction inhibiting such conditions, without regard to whether the smoke, gases and noises were occasioned by any negligence on the part of the defendant, or resulted after the exercise of all care and caution possible on its part.

The defendant relies upon the fact that it is a quasi public corporation, and as such has been authorized by the Legislature in its charter to locate its railroad as a highway for the transportation of passengers and commodities between the two definite points, Harsimus Cove and Bergen Cut, and that as a public corporation, it has been clothed with the right of eminent domain, without which, such a necessary improvement as a turnpike road or a railroad could not be constructed for the accommodation and convenience of the public.

It is not denied that the railroad of the defendant, as here complained of, was lawfully located, as authorized by the Legislature of New Jersey and for the public purposes stated in its charter. To

fulfill these public purposes, it was authorized, among other things, to use steam for the propulsion of its engine and the movement of its trains. Steam, of course, cannot be created except by the combustion of fuel, and the combustion of fuel inevitably produces more or less smoke. These usual and normal results of the operation of a railroad, like the noises created by the movement of its trains, are necessarily contemplated and taken into account by the Legislature that authorizes its construction. They enter into the common experience of modern life and are recognized as necessary accompaniments of the convenience and advantages which a railroad transportation brings to the public. Their sufferance is one of the penalties of living in a large community like a city. The annoyance and inconvenience occasioned thereby are to be viewed from the same legal standpoint as are the annoyance and inconvenience necessarily suffered by those who live along a turnpike or other highway. Some dust and noise arising from the traffic along such highways, are the necessary and unavoidable incidents of the authorized and lawful use thereof. The same may be said of the noise of street cars. It is an undoubted annoyance to the people living along their route. To many people, it is a serious annoyance, often interfering with sleep and quiet home life. As said by Judge McPherson in the case of Bunting vs. Pennsylvania R. R. (*supra*), the perfectly proper use of these vehicles constitutes an annoyance, from which people suffer and sometimes seriously, but this inconvenience is an injury for which there is no redress.

It may be stated, therefore, as a principle well established by reason and authority, that the consequential, incidental and unavoidable annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad, from its non-negligent and careful operation, does not constitute an actionable nuisance. It is also equally well established that, where such damages are the result of the want of due care and skill in the conduct and operation of the railroad, the defendant company is liable to those injured thereby.

The correctness of these propositions seems to be recognized by the complainant, as the stress of its argument, as we have pointed out, is not placed upon any contention that the damage complained of was caused by the negligent operation of its railroad by the defendant, but, that the coming of the smoke and cinders upon the complainant's premises, without regard to whether such coming was the result of negligence of the defendant in the operation of its road, or was consistent with the utmost care and skill in such operation, was a taking of complainant's property without due process of law or just compensation, and was within the constitutional inhibition in that regard.

This point is urged with much plausibility of argument by counsel for complainant, and the cases cited in its support require careful consideration.

There must be something peculiar and exceptional in the situation, to warrant the contention that the normal result of the careful operation of a railroad authorized by law, is the taking of private

property for public use, within the inhibition of the Constitution. A careful examination of the cases cited and quoted from in the brief of the counsel for the complainant, justifies this assumption. We refer now to a few of those which seem to be most relied upon, and the opinions in which are most largely quoted from in complainant's brief.

The first of these,—Chicago G. W. Ry. Co. vs. First M. E. Church, 102 Fed. Rep. 85, was a case in which the defendant company, by virtue of the right granted by a municipality to operate and maintain a railroad on a public street, claimed the right to erect a water hydrant in the middle of said street, for the use of its locomotives, opposite the center of the church building of the plaintiff and 35 feet distant therefrom, and a depot or station on the opposite side of the street, 60 feet distant from said church. The gravamen of the complaint, as stated by the court, was that, by reason of the location of said depot and the erection of said water tank, the engines of the defendant company were constantly going backwards and forwards in front of the church, on Sundays and other days, for the use of said water hydrant, and by the noise, smoke, cinders, etc., interfered with and impaired the easement of the complainant as an abutting owner on said street. In reference to these facts, the Court of Appeals for the Eighth Circuit said:

"Whatever the fact may be, no complaint is made in the petition in this case, on account of the mere movement of trains over the defendant's tracks in the street. It is the consequences flowing from the use of the street and its track for other purposes than merely moving its trains, that is complained of. * * * Granting, therefore, that the defendant had a right to run its trains over the track in Choctaw Street, and that it was not liable for any damages unavoidably resulting therefrom, this concession falls far short of supporting the defense in this action. It did more than run its trains over its tracks. It erected a station, at which its passenger trains stopped, and a water hydrant in the middle of the street, under the very windows of the church, at which all its trains, freight and passenger, stopped to take water. * * * It was not competent for the city to make a grant to the railroad company, which would exempt it from liability to the abutting owner from maintaining such a private nuisance. But the city made no such grant, either expressly or by implication. The rule, that no one will be heard to complain of the proper exercise of a lawful authority, cannot be invoked to shield the defendant in this case. The railroad company had no authority to erect its water hydrant where it did. * * * Conceding that the noise, vibrations and inconveniences and annoyances which are unavoidable in the lawful running of trains over a railroad track, and which are common to the whole public and to all the abutting owners of property on the street, are not actionable injuries, the plaintiff's right of action is not affected thereby."

The language quoted by counsel in his brief, from this opinion, refers to this unlawful occupation of the street in front of complainant's property, which, together with the noises, smoke, etc., incident

thereto constituted a nuisance and invasion of the easement of the complainant upon said street, as an abutting owner thereon.

The acts complained of were not necessary to the authorized operation of defendant's road. It is in this respect not unlike the leading case of B. & P. Ry. Co. vs. Fifth Baptist Church, 108 U. S. 317, cited by the complainant and recently considered by this court in the case of Bunting vs. Penna. R. R. Co. The hydrant and station, the sources of the injury complained of, were not necessary to the operation of the road. Like the repair shop in the Fifth Baptist Church case, they concerned the rights and conduct of the defendant in its private capacity, and they could have been located in some other convenient place, where the annoyance therefrom would not have constituted either a private or public nuisance.

So, in the well considered case of Muhlker vs. Harlem Railroad Company, 197 U. S. 544, cited by complainant. Plaintiff sued to enjoin the use of a certain elevated railroad structure on Park Avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access, and other rights appurtenant to property abutting on said public street. It appears that, in pursuance of legislative authority prior to the erection of the elevated railroad complained of, the road ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by walls three feet high. Pursuant to an act of the Legislature of the State of New York, of 1892, there was constructed along said Park Avenue, in front of plaintiff's premises, a new permanent elevated railroad structure of iron and steel, about 59 feet wide, with four tracks laid on a solid road-bed, having a mean elevation of about 31 feet above the surface of said avenue. It was contended by the defendant company that this was a mere change of its railroad from the surface to the elevated structure, and within the general powers granted to it by the Legislature. The court held, however, that the new structure was attached to it, as an essential and inviolable part, easements of light and air of an abutting owner on the street, above the surface thereof, Mr. Justice Day saying in the course of his opinion on behalf of the court:

"It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it, as an essential and inviolable part, easements of light and air, as well as of access."

The abutting owner, subject to the rights of the public in the street, as a highway, had a well recognized property right in the easement of light and air and access in and to such street. This property right was clearly invaded, if not destroyed, by the change made by defendant from a surface or sunken road to the permanent physical structure of the elevated road complained of, and by the smoke and other annoyances incident to the operation thereof. But it will be observed that the smoke annoyance was only considered as part of and incident to the unlawful taking, by the permanent structure, and part of the consequences of an unlawful act, and there is no intimation that it would have been considered by itself an

actionable nuisance, or unlawful taking, as incident merely to the surface or sunken road.

The importance, if not the paramount authority, of the New Jersey decisions in this regard must not be overlooked, and it is recognized by counsel for the complainant, who relies strongly for the support of his contention upon the supposed authority of Penna. R. R. Co. vs. Angell, 41 N. J. Eq. 316. The facts, as disclosed in the opinion of the court in that case, are that the complainants were owners and occupants of a dwelling house, on the southerly side of Bridge Street, between Second and Third Streets, in the city of Camden. The defendant's tracks ran through the central part of Bridge Avenue, in front of complainant's dwelling, across Second Street, into its terminal yard, which extends from the westerly side of Second Street to the Delaware River. The bill averred that the defendant used its tracks in front of complainant's house, for the purpose of distributing cars and making up trains in its freight and passenger business, and that it kept locomotives and cars laden with livestock standing there, so that by reason of the stenches, noises, smoke, steam and dirt thereby occasioned, the comfort of complainant's home was seriously impaired. And an injunction was prayed for.

The defendant's justification was rested upon the ground that the Legislature and the Common Council of Camden had authorized the defendant to use Bridge Avenue for its business; that its business required such use as the defendant had hitherto made, and therefore the use could not be, in a legal sense, injurious. The court said:

"There are two sufficient answers to this claim.

"The first is, that neither the Legislature nor the Common Council has attempted to grant so extensive a privilege as is here set up. The charter of the Camden and Amboy Railroad Company (the lessor of the defendant), passed in 1830, authorized it to construct and operate a railroad, with all necessary appendages, within limits embracing the locality now under consideration. In 1834, the Camden Common Council, by resolution, authorized that company to use Bridge Avenue for the purpose of its roadway. * * * In 1862, the City Council, by 'an ordinance to afford facilities to the Camden and Amboy Railroad Company for the running of their trains through the city of Camden,' gave its consent and authority to the company to lay sidetracks, running obliquely from a point on the railroad along Bridge Avenue, between Second and Third Streets, to and upon the company's depot property lying west of Second Street. From these laws and regulations arise whatever rights the defendant, which is the lessee of the Camden and Amboy Railroad Company, appears to have in Bridge Avenue, in front of complainant's house. In our judgment, they indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not for the purposes of a station yard. The primary privilege given is that of passage; this and its reasonable incidents cover the whole scope of the grant. * * * But when, in the ordinary course of its business, the company devotes a portion of its roadway to station purposes, it goes beyond express legislative sanction, and can support

itself, if at all, only as a private individual might. This is what the defendant did in Bridge Avenue. Having a right of passage there, it used its tracks as though they were within its terminal yard, and so used them constantly in its every day concerns. For this, there is no legislative or municipal authority.

"But, secondly, an act of the Legislature cannot confer upon a private corporation, acting primarily for their own profit although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners."

Of course, this language must be taken in connection with the facts of this case, as discussed in the previous part of the opinion. It had just been decided that neither the Legislature nor the Common Council, by authorizing the defendant to build its road on Bridge Avenue, had authorized it to create a terminal yard or station on that avenue, and that the location and building of such yard and station must be taken to be done in the private individual capacity of the defendant, and therefore not incident to the public purposes for which a passageway for its tracks was granted along Bridge Avenue. It was therefore in the second place properly and logically argued that neither the Legislature nor the Common Council of Camden could authorize the use of the street for these private purposes of the corporation, as distinguished from its public purposes, to the detriment of the owners and occupants of dwellings abutting on said avenue, without making compensation therefor. This is the doctrine in *B. & P. Ry. Co. vs. Fifth Baptist Church*, viz., that in the location and erection of a repair shop, the company was acting in its private capacity, and it was not necessary for its public purposes that such shop should be erected on the particular site chosen. The opinion concludes:

"It must not be gathered from these propositions that all those inconveniences, which are the necessary concomitants of the location of railroads in populous neighborhoods, are to be considered civil injuries. That railways shall be so constructed and operated is required by the unanimous consent of the community, and the annoyances thence unavoidably arising are not of sufficient importance to be regarded as invasions of those rights of property which society recognizes and protects. They must be classed rather among those limitations which the social state imposes upon the enjoyment of private property for the common good."

We cannot, however, agree with the closing sentence of this paragraph, quoted by complainant's counsel, if it means, as argued by him (which we do not assume that it does) that the liability of the defendant can be made to depend upon the degree of the annoyance caused by the operation of the road, without regard to whether that operation be conducted negligently or with the utmost skill and care. If, by the exercise of due care, such annoyances are avoidable, of course the defendant company should be held liable therefor. What we have said, however, as to the facts and opinion in this case are sufficient to show that *ratio decidendi* does not touch the issues in the case now before us.

This judgment of the Court of Errors and Appeals was made in

1886. In 1888, the Supreme Court of New Jersey delivered its opinion, by Chief Justice Beasley, in the case of Beseman vs. Penna. R. R. Co., 50 N. J. L. 235.

The suit was for damages alleged to have been done to the houses and lands of the plaintiff, by the running of defendant's trains. The defendant was the same as the defendant in the present case, and the part of the road on which it is alleged the injuries complained of originated, is the same as that involved in the present suit, to wit, that part of the road between Harsimus Cove and Bergen Cut which runs on an elevated structure south of Sixth Street and parallel therewith.

The declaration, in substance, alleged that the plaintiff was the owner of certain lots of land in Jersey City, fronting on Fifth Street, on each of which lots there were dwelling houses on the front and rear, and that the defendant, on the first of January, 1874, built an elevated track for a railroad (the same which is now complained of), running at the rear of said lots and very near, to wit, within ten feet, to the rear of the dwelling houses situated on the rear of said lots, and has so used said elevated track for the passage of locomotives and cars in the transportation of cattle, sheep, swine, &c., as to render said dwelling houses of said plaintiff unfit for habitation, and of no use or value to said plaintiff whatever, and that said defendant, during all the time aforesaid, both on the day named and at all hours of the night time, has wrongfully allowed its cars, so loaded, emitting noisome and unhealthy odors, to stand upon said track within close proximity, to wit, the distance of ten feet, to the dwelling houses on the rear of said lots, and has then and there shifted and distributed its cars and blown the whistle of its locomotives, and started its trains of cars, and suddenly stopped and backed them, and started them again, causing great and unusual noises in the neighborhood of said dwelling houses, and causing divers noxious, offensive and unwholesome vapors, fumes, smoke, smells and stenches to flow, arise and surround said dwelling houses, and thereby also jarring the doors and walls of said dwellings and breaking plaster upon the walls, and by means aforesaid has driven the tenants from said houses and has rendered the same untenantable and unfit for use, etc.

The first plea was the general issue. The second was a special traverse, in which the defendant set out its chartered right to build this elevated road between Fifth and Sixth Streets, in Jersey City, and parallel therewith; that after its construction, the defendant, in order to carry into effect the objects of the incorporation, used the same in the prosecution of its business as a common carrier of passengers and freight, during the time mentioned in the declaration, as it lawfully might do, by reason of the authority aforesaid, and that the noises arising from the passage, shifting and distribution of its cars and blowing of the whistles of its locomotives, and the smoke from its engines, complained of by the plaintiff, were necessarily created in the careful and skillful operation of its road, and were the supposed grievances of which the plaintiff in her declaration complained; "without this," &c.

On the demurrer to this plea, Beasley, chief justice, speaking for the court, said among other things:

"Its" (defendant's) "position is that, for such incidental and unavoidable damage it is not responsible. The plaintiff occupies the opposite ground, claiming that with respect to private property, a railroad is, *per se*, a nuisance whenever it throws a detriment such as would be actionable at common law on such property.

"That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damnedified by the illegal act of another, to whom the law gives redress, but its vindication extends to every person who is damnedified at all—unless, indeed, the loss sustained be so small as to be noticeable by force of the maxim, '*De minimis non curat lex.*' The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide spreading, impairing in a sensible degree some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doctrine would make these companies, touching land owners, general tort feasors; their tracks run for miles through cities of the state, and every land owner on each side of the track would be entitled to his action; and so in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by the thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility."

The whole of this opinion must be read, to appreciate the clearness of its reasoning and the broad statesmanship, as well as the judicial acumen of its conclusions. In the course of his opinion, the chief justice refers to the case of Pennsylvania Railroad Co. vs. Angell (*supra*), and the B. & P. Ry. Co. vs. Fifth Baptist Church (*supra*), upon both of which counsel for the plaintiff relies.

"Neither of these decisions," he says, "is in point, and the principles of law declared in the latter is (sic) directly adverse to the proposition laid as the basis of this suit. The former of these precedents presented to the court the naked proposition, whether the railroad company, the defendant in the proceeding, should be restrained from doing certain acts which were obviously *ultra vires*.

* * *

"The decision of the Supreme Court of the United States, just referred to, rested on the same basis. A railroad company located its repair shop and engine house next to a church, to which it was a nuisance, by reason of the noises occasioned by the business carried on at the place. The court declared that the company could not justify the maintenance of such a nuisance. The propriety of this

result seems unquestionable. The railroad company, in selecting a place for repair shops, acted altogether in its private capacity. Such location was a matter of indifference to the public and consequently, with respect to such an act, the corporation stood on the footing of an individual and was entitled to no superior immunities. But in this same case, Mr. Justice Field, in his opinion, is careful to emphasize the difference in legal results between those damages which are the necessary product of the running of a railroad and those which are not of that character, for he says: 'Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care, is *dannum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.'

The opinion in the Beseman case then disposes of the constitutional question, as to the taking of private property without compensation, on the reasoning hereinbefore indicated. We have dwelt upon this case at such length, because of the importance and authority it has attained as a leading case in the jurisprudence of this country. We have been referred to no decision of the federal or state courts, in which its reasoning and conclusions have been directly controverted. This judgment of the Supreme Court of New Jersey was afterwards unanimously affirmed by the Court of Errors and Appeals, for the reasons given by the Supreme Court (52 N. J. L. 221).

Many cases in other states have been cited by counsel for the defendant, in which Beseman vs. Penna. R. R. Co. is approvingly referred to. The principle established has also been affirmed by so many decisions in the courts of New Jersey, that it may now be considered as the settled law of that state, as shown in the following list of cases cited by counsel for the defendant:

- Church of Holy Communion vs. Paterson Extension R. R. Co., 46 N. J. Eq. 376;
Simmons vs. Paterson, 60 N. J. Eq. 385;
M. E. Church vs. Penna. R. R., 48 N. J. Eq. 455;
Stockton vs. Central R. R. Co., 50 N. J. Eq. 72;
Hayes vs. Waverly & Passaic R. R. Co., 51 N. J. Eq. 350;
Ridge vs. Penna. R. R. Co., 58 N. J. Eq. 176;
Marcus Sayre Co. vs. Newark, 60 N. J. Eq. 362;
Thompson vs. Penna. R. R. Co., 51 N. J. L. 43;
Costigan vs. Penna. R. R. Co., 54 N. J. L. 236-7;
Roebling vs. Trenton Ry., 58 N. J. L. 674;
Church of the Holy Cross vs. Paterson R. R., 68 N. J. L. 410;
Jenkins vs. Penna. R. R. Co., 67 N. J. L. 332.

In some of these cases, it is expressly pointed out that the judgment in Beseman vs. R. R. in nowise conflicts with that in Penna. R. R. vs. Angell, which fact is apparent from the examination already made of the two cases. It would unduly extend this opinion to discuss the numerous decisions cited by counsel on either side, in their respective briefs. Many of them distinctly support the position here taken, and none of them seriously controvert or oppose it.

We have carefully examined the so-called "New York Elevated Railroad Cases," referred to and relied upon by complainant, to wit:
Lahr vs. Met. El. Ry. Co., 104 N. Y. 268;
Story vs. Same, 90 N. Y. 122;
Bohm et al. vs. Same, 129 N. Y. 576;
Sperb vs. Same, 137 N. Y. 155.

We have already indicated the grounds upon which they should be distinguished from the present case, in our examination of the decision of the Supreme Court, in Chicago G. W. Ry. Co. vs. First M. E. Church (*supra*), as also in what has been said as to the principle involved in the decision of the Supreme Court in Balt. & P. Ry. Co. vs. Fifth Baptist Church (*supra*).

It only remains to again note, in regard to these cases, that the decisions therein proceeded upon the ground so clearly stated in one of them (Story vs. N. Y. El. R. R. Co., *supra*), by Danforth, J., speaking for the Court of Errors and Appeals. After stating the relative rights of the public and abutting owners in the street in question, he says:

"It is conceded to be a public street. But besides the right of passage, which the grantee, as one of the public, acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. The official survey—its filing in a public office—the conveyance by deed referring to that survey and containing a covenant for the construction of the street and its maintenance, make as to him and the lot purchased a dedication of it to the use for which it was constructed. The value of the lot was enhanced thereby, and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such. For that purpose, no special or express grant was necessary; the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves sufficient. (Wyman vs. Mayor of N. Y., 11 Wend. 487; Trustees of Watertown vs. Cowen, 4 Paige, 510.) The right thus secured was an incorporeal hereditament; it became at once appurtenant to the lot, and formed 'an integral part of the estate' in it. It follows the estate and constitutes a perpetual incumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient tenement. (Child

vs. Chappell, 9 N. Y. 246; Hills vs. Miller, 3 Paige, 256; Trustees of Watertown vs. Cowen 4 Id. 514.)

"Nor does it matter that the acts constituting such dedication are those of a municipality. The state, even, under similar circumstances, would be bound, and so it was held in the City of Oswego vs. Oswego Canal Co. (6 N. Y. 257). * * *

"But what is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way."

In Lahr vs. Met. El. R. R. Co. (*supra*), we quote these paragraphs from the syllabus:

"An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perverter of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the Legislature can legalize or sanction, without providing compensation for the injury inflicted upon property of abutting owners.

"Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air."

No one can carefully read these important and much discussed cases, without at once perceiving the peculiar conditions, with reference to which they were decided, which distinguish them from cases such as the present. The bills of complaint in these cases were framed to logically meet the contention, that the building of the elevated railroad on the street and in front of the houses occupied by the complainants, was a physical taking of property without compensation, and the prayer was in the alternative, for the payment of such damages assessed by a referee duly appointed, or an injunction to restrain further building or operation of the road until such damages were paid.

All this is clearly pointed out by the author, in Pomeroy's *Equity Jurisprudence*, Vol. 5, Sec. 470.

Notwithstanding the disclaimer of complainant's counsel, that the action below was based upon any allegation of negligence, the prayer of the bill and a part of the argument of counsel compel us to turn to that aspect of the case, as to which claim is made for an injunction and damages, on the ground that the nuisance produced by the smoke vapors, and noises emanating from defendant's railroad, were due to its negligent operation.

A careful examination of the testimony in this case does not permit us to find that the annoyance complained of (and we do not doubt that it was serious in its character) was due to negligence on the part of the defendant. That an unnecessary amount of black smoke may at times, from particular engines, have been emitted, is quite probable, but there is no evidence to convince the court that

the road was operated without due care in respect to the firing of its locomotives. There is no charge, as in the "Bunting" case, much less any evidence amounting to proof, that the defendant was negligent in not using other fuel than bituminous coal, or that it was possible to have used such other fuel and successfully have carried on the business of the railroad. Nor were there any direct evidence on the part of the complainant, of such negligence in the operation of the road and the firing of the engines, as would account for the nuisance complained of. On the contrary, the evidence of the defendant, consisting of the various printed instructions given to its firemen at different times, and the testimony of Alfred W. Gibbs, its chief mechanical engineer, shows the efforts made by the defendant to so manage its locomotives as to minimize the emission of smoke, and would seem to dispose of the suggestion of liability on the ground of negligence.

Moreover, the prayer of the bill, as framed, does not ask for such definite and specific exercises of injunctive relief, as would be reasonably enforceable. There is no specific allegation or proof of the particular conduct or practices which constitute such negligent operation of the road as cause the annoyance in question, and which, if established, should be enjoined. There is no allegation and no showing that other fuel could reasonably have been used by the defendant for the lessening of the smoke, upon which a mandatory injunction could be asked, requiring the use of such fuel, or a direct injunction on that ground against the use of soft or bituminous coal.

No specific act or acts of misfeasance or nonfeasance, constituting negligence on the part of the defendant, and as such the cause of the grievance complained of, has been so sufficiently alleged or proved as would enable a court of equity effectively to prevent its continuance. Of course, if complainant's principal contention (presumably founded upon the mistaken allegation that defendant's road was maintained and operated upon Sixth Street) had been established, the existence of the road itself on Sixth Street would, so far as the property of complainant situated on that street was concerned, and such property alone, have been a taking of complainant's property without compensation, and entitled it to an injunction against the operation of such road until such compensation had been duly ascertained and paid, conformably to the doctrine of the New York Elevated Railroad cases, as above referred to.

The prayer of the bill, as we have seen, asks for an injunction, commanding the defendant, its servants, &c., to absolutely desist and refrain from so operating its said railroad locomotives and engines as to cause or permit black smoke, &c., from its said engines and locomotives, to fall upon or enter into the premises and structures of complainant "in such appreciable quantities as to interfere with the reasonable use and enjoyment thereof."

We have already shown that no case has been made out for such a general injunction as this. In the absence of any determination in a suit at law, as to the fact of negligence by the defendant in the operation of its road, in the respect referred to, a court of equity would be embarrassed in undertaking, by its decree, to enjoin the defendant against the issuing of more soot and cinders than was

necessary to the careful and proper operation of its road. Such a decree would be futile and unenforceable.

Assuming, however, that the bill had been duly amended in the important respect we have pointed out, to wit, the location of the road on the route acquired by the plaintiff south of Sixth Street, and not on Sixth Street itself, and that sufficient averments of negligence, general and specific, were contained in the bill, we are constrained to find that the record fails to disclose sufficient evidence to amount to proof of such negligence, or that the acts of defendant, in the operation of its railroad, have constituted, and do now constitute, an actionable nuisance and are so unnecessary, avoidable, and unreasonable as to warrant the issuing of an injunction, restraining the defendant from the commission of such acts.

Without at all minimizing the annoyance and discomfort suffered by the complainant, as set out in its bill of complaint, this case cannot be taken from without the operation of the principles which we have already discussed, and which were so clearly announced in the case of Beseman vs. Penna. R. R. Co. In the absence of clear proof of negligence on the part of the defendant, the right of action or the right to equitable relief cannot be made to depend upon the greater or less degree of the annoyance complained of. As said in the Beseman case, "when property has been incidentally injured, no matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless, and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use."

In the view here taken, it is unnecessary that we should express any opinion as to the defenses of "laches" and "prescription," urged by defendant's counsel.

For the reasons stated, the decree of the court below, dismissing the bill of complaint, is hereby affirmed.

(Received and filed. August 25, 1913. Saunders Lewis, Jr., Clerk.)

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1913.

No. 1734. (List No. 47.)

THE ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY
CITY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

Appeal from the District Court of the United States, for the District
of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

GEO. GRAY,
Circuit Judge.

Philadelphia August 26, 1913.

Endorsed: No. 1734. Order affirming decree. Received and Filed August 26, 1913. Saunders Lewis, Jr., Clerk.

United States Circuit Court of Appeals, for the Third District.

In Equity.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY CITY, Complainant and Appellant,
against
THE PENNSYLVANIA RAILROAD COMPANY, Defendant and Appellee.

Appeal and Allowance.

The above named complainant, the Roman Catholic Church of St. Anthony of Padua, Jersey City, N. J., feeling itself aggrieved by the decree made and entered in this cause on August 26th, 1913, and filed in the office of the Clerk of the Court affirming a decree of the District Court of the United States for the District of New Jersey dismissing the bill of complaint herein with costs; does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith and it prays that this appeal may be allowed and that a citation issue as provided by law; and that a transcript of the record and proceedings, evidence and papers upon which said decree was based duly authenticated may be sent to the Supreme Court of the United States and that the said decree of said Circuit Court may be reversed and such decree made as to said Supreme Court of the United States shall seem meet and proper.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal to be made.

FRANK M. HARDENBROOK,
*Atty for Plff & App't The Roman Catholic
Church of St. Anthony of Padua.*

15, Exchange Place, Jersey City, N. J.

Jersey City, N. J., — — —, 1913.

And now to wit on Sep. 27, 1913, it is ordered that the appeal be allowed as prayed for.

JOHN B. MCPHERSON,
*Judge of the United States Circuit Court
of Appeals for the Third District.*

Endorsed: No. 1734. Petition for Appeal, and Order allowing same. Received and Filed September 26, 1913. Saunders Lewis, Jr., Clerk.

Assignment of Errors.

United States Circuit Court of Appeals for the Third District. In Equity.

THE ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY CITY, Complainant and Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant & Appellee.

Assignment of Errors.

And now on this — day of —, 1913, comes the complainant by its solicitor Frank M. Hardenbrook, and says that the decree entered in this honorable court in the above cause on the 26th day of August, 1913, is erroneous and unjust to the complainant in the following particulars:

1st. That the said Circuit Court of Appeals erred in affirming the decree of the United States District Court of the state of New Jersey in dismissing the bill of complaint therein.

2nd. That the said Circuit Court of Appeals erred in affirming the decree of the United States District Court adjudging and finding in its decree that the defendant in operating its road under legislative authority, has not taken, and does not take from the complainant any property to which the complainant is legally entitled.

3rd. That the said Circuit Court of Appeals erred in affirming and finding in its decree that acts of the defendant in the operation of its railroad, have not constituted and do not constitute a nuisance and which acts are not unnecessary, avoidable and unreasonable, but are necessarily connected with the construction and reasonable operation by the defendant of its railroad.

4th. That the said Circuit Court of Appeals erred in affirming the decree of the said District Court in disregarding the protest and objection of the complainant to the aforesaid findings and conclusions embodied in its decree.

5th. That the said Circuit Court of Appeals erred in affirming the decree of the said District Court in not granting an injunction pursuant to the prayer of the bill of complaint.

6th. That the said Circuit Court of Appeals erred in affirming the decree of the said District Court in not awarding to the complainant damages against the defendant pursuant to the prayer of the bill of complaint.

7th. That the said Circuit Court of Appeals erred in affirming the decree of the said District Court in denying the complainant's motion to amend the bill of complaint before the argument of the cause, and in the making of the order of said court on the 22nd day of July, 1912.

8th. That the said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the complainant's structures are of substantial construction, and are except for the acts of the defendant adapted to their respective purposes; and that the immediate neighborhood thereof is thickly populated and is exclusively a residential district.

9th. That the said District Court of Appeals erred in affirming the decree of the said District Court in not finding that the defendant in the operation of its railroad maintained up to 1901 and operated south of Sixth Street, and immediately to the south of the lands and structures of the complainant, a line of railroad consisting of two tracks upon which it operated a number of freight trains, and which was increased to eight tracks in 1901.

10th. That the said Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that since 1901, trains, cars, switch engines and locomotives continuously at all hours of the day and night, passed upon the said tracks, the lands and premises, and structures of the complainant, and which engines and locomotives since 1902 burned and are burning continuously vast quantities of soft bituminous coal.

11th. That the said Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that from the burning and partial combustion of which soft and bituminous coal, there arises and continuously has arisen since 1902, dense volumes of black smoke, soot, cinders and ashes, noxious and unwholesome gases, and offensive odors which are carried into, upon and through the structures and premises of the complainant.

12th. The said Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the omissions of such soot, smoke, cinders and ashes, seriously injured the complainant's buildings, and uses for their respective purposes.

13th. The said Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the operation of the said trains and engines is, and throughout said time has been attended with noise sufficient in extent to interrupt the services in the church, and render it impossible for the complainant to occupy its church with any comfort as a place of worship.

14th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the rumbling of the engines passing in and along its tracks the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the engines with its cinders dust and offensive odors, created a constant disturbance of the religious exercises of complainant's church.

15th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the noise of the engines was often so great that the voice of the pastor could not be heard.

16th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the smoke and cinders from defendant's engines sometimes entered the church in such quantities as to cover the seats with dust and soot, and soil the garments of the worshippers.

17th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that disagreeable odors, added to the noise, smoke and cinders rendering the church not only uncomfortable, but also unendurable as a place of worship.

18th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the enjoyment of the complainant and congregation in the church as a place of religious exercises, and for prayer and worship, was disturbed by the said acts of the defendant.

19th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the operation of the said trains and engines, is and throughout said time has been attended with noises sufficient in extent to interrupt the teaching in the school, and rendered it impossible for the complainant to occupy the school with any comfort as a place of teaching.

20th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the rumbling of the engines passing in and along its tracks, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the engines with its cinders, dust and offensive odors, created a constant disturbance of the teaching and lessons in complainant's school.

21st. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the noise of the engines was often so great that the voice of the teachers could not be heard.

22nd. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the smoke and cinders from the defendant's engines sometimes entered the said school in such quantities as to cover the seats with dust and soot, and soil the garments of the children.

23rd. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the disagreeable odors, added to the noise, smoke, cinders and ashes rendered the school not only uncomfortable, but also unendurable as a place of teaching.

24th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the enjoyment of the complainant, and the children in the school as a place of teaching, was disturbed by the said acts of the defendant.

25th. That the Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the operation of the defendant's trains and engines is, and throughout said time has been attended with noises sufficient in extent to render it impossible for the complainant's officiating priests and attendants to occupy its rectory with any comfort.

26th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the rumbling of the engines passing in and along its tracks, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the engines with its cinders, dust and offensive odors created a

disturbance of the rest, comfort and repose of the officiating priests and their attendants.

27th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the smoke and cinders from defendant's engines, sometimes entered in such quantities of the rectory to cover the walls, floors, desks, furniture and beds with soot, coal, dust and smoke and soil the garments of the officiating priests and their attendants.

28th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that disagreeable odors, added to the noise, smoke and cinders rendered the rectory not only uncomfortable but also unendurable as a place of residence.

29th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the occupation and use made of the defendants of the tracks opposite to the complainant's structures, is that of a freight yard, and is used exclusively in making up and switching of trains.

30th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the defendants in the location of its freight yard at that point acted in a private and public capacity.

31st. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the defendant could at all times have effectively operated its *its* railroad with a non smoke producing fuel.

32nd. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that soft or bituminous coal could by careful firing be burned so as to not to produce smoke in sufficient quantities to be objectionable.

33rd. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the smoke produced by the defendant's engines was unreasonable and unnecessary.

34th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the smoke produced by the defendants was due to the negligence of the defendant in burning a smoke producing coal.

35th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the smoke produced by the defendant was due to the negligent and unskillful use and firing of coal by its firemen.

36th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the negligence of the firemen was that of the defendants in not subjecting them to supervision.

37th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that where the acts of the defendant in drilling its cars, &c., amounted to a legal nuisance to the complainant's structures adjacent to the track complained of, and it cannot defend and justify such acts on the ground of necessity or adverse uses.

38th. The Circuit Court of Appeals erred in affirming the

decree of the District Court in not finding that whatever prevents the comfortable use of the property by the members of the congregation or those who, by its permission unite with them in the church, is a disturbance or annoyance as much so as if access by them to the church was impeded and rendered inconvenient and difficult.

39th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that to take or impair these rights of the complainant is to take the right of exclusion, and there is a partial taking to the lots, as much as if one corner was cut off and the rule of compensation must be applied.

40th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the easement of light and air are so much property as the lots themselves, and an interference with which constitutes a taking of private property without compensation.

41st. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that whenever the exercise of a right operates to destroy an easement incident to real property or amounts to an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, that this is a taking of property.

42nd. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that there need not be an exclusive appropriation of the property, but such an interference with the beneficial use thereof as operates an essential abridgement of the owner's rights incident to and an essential part of the estate.

43d. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the maintenance of a nuisance to real estate amounts to a taking of private property and cannot be legalized by a legislature even upon terms of compensation.

44th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that for such annoyance and discomfort, the courts of law will afford redress and give damages against the wrong doer, and when the cause of annoyance and discomfort are continuous courts of equity will interfere and restrain the nuisance.

45th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the acts of the defendant have taken from the complainant property consisting of the easement of light and air, without due process of law and without compensation, and is a violation of the provisions of the Constitution of the United States.

46th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the annoyance is so great as to destroy or substantially impair the legitimate use of complainant's property, and the complainant is entitled to a redress.

47th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that said acts of the defendant are continuous and will cause great and irreparable loss to the complainant and subject it to the prosecution of a multiplicity of suits

for damages, unless defendant be restrained therefrom *the injunction*.

48th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that a Court of Equity is bound to give preventative relief and to refuse it is to allow the defendant to take complainant's property upon terms of paying such compensation from time to time, as a jury may assess.

49th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the right of the complainant to recover for the annoyance and discomfort of its members in the use of its property and the liability of the defendant to respond to damage for causing them, are not affected by their corporate charter.

50th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the said acts of the defendant are avoidable and unreasonable, and not necessarily connected with the construction of a reasonable and careful operation of the railroad.

51st. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the defendant cannot claim exemption from liability for a nuisance maintained by it in the operation of its railway, whereby private — is damaged, because it is operating under a charter giving the right to do business.

52nd. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the defendant is a private corporation, though its uses are public.

53rd. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the common good must yield to the private right.

54th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that that which is authorized by the legislature within the strict scope of, i-s constitutional power cannot be a public nuisance, but that it may be a private nuisance; and that the legislative grant is no protection against action for damages resulting therefrom.

55th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that where a defendant acquires a land for terminal purposes in the heart of a City, it cannot use such land in disregard of the comfort and property of others, but must adjust its operation so as to produce the least annoyance possible.

56th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that where a liability of the defendant for an *annauance* and discomfort caused is the same as to that of individuals for a similar wrong.

57th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the same rule in that respect applies to corporations as to individuals.

58th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the defendant is equally responsible for injuries done in the course of their business by their servants.

59th. The Circuit Court of Appeals erred in affirming the decree of the District Court in not finding that the defendant has not acquired a prescriptive right to operate its railroad in the manner set forth in the foregoing assignment of errors.

60th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the said acts of the defendants are a nuisance and one of special injury to the complainant.

61st. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that no decision of the State Courts of the State of New Jersey made subsequent to the title acquired by the complainants to its lands and premises, can affect or change the rights of complainants, as found by earlier decisions of the Courts.

62nd. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the decision of the Supreme Court of New Jersey in the case of Beseman vs. Penn. R. R. Co., 50 N. J. Law 235 February 1888, did not create a rule of law exempting the defendant for its acts of nuisance, except negligence be shown, and which rule of law did not exist at the time the complainant acquitted its property and which rule of law is contrary to the rule of law in existence of the time it acquired its title to its property, as decided in the cases of Davidson vs. Isham, (N. J. Equity 190. (Feb., 1852.). Ross vs. Butler, 19 N. J. Equity 294 (Oct. 1868). Tinsman vs. B. & D. R. R. Co., 25 New Jersey Law 255, (Nov. 1854.) and many other cases.

63rd. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the damage to the complainant's structures from smoke, soot, cinders and ashes of the defendants was \$11,552.71.

64th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in not finding that the damages for loss of comfort and annoyance to the congregation in the church, the children and teachers in the school and the priests and their attendants in the rectory was \$40,770.

65th. The said Circuit Court of Appeals erred in Affirming the decree of the said District Court in not awarding to the complainant the sum of \$52,292.71 damages.

66th. The said Circuit Court of Appeals erred in affirming the decree of the said District Court in refusing to an injunction to the complainant restraining the defendant in the manner and form as prayed for in complainant's bill of complaint.

Wherefore and for divers other reasons in the record and decree in this cause, complainant prays that the decree herein affirming the decree of the said District Court dismissing the bill of complaint be reversed, and the court be directed to enter a decree in all respects in accordance with the prayer of the bill of complaint.

FRANK M. HARDENBROOK,
Sol'r for Complainant.

15 Exchange Place, Jersey City, N. J.

Endorsed: No. 1734. Assignment of errors. Received and Filed September 26, 1913. Saunders Lewis, Jr., Clerk.

Bond on Appeal.

In the United States Circuit Court of Appeals For the Third Circuit.

THE ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY CITY, Appellant,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Appellee.

Bond for Costs in Equity.

Know all men by these presents, That the Roman Catholic Church of St. Anthony of Padua, as principal and Boleslaw Kwiatkowski as surety are held and firmly bound unto the above named Pennsylvania Railroad Company in the sum of two hundred and fifty dollars for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents. Sealed with our seals and dated the twenty-sixth day of September, in the year of our Lord nineteen hundred and thirteen.

Whereas, the above named Roman Catholic Church of St. Anthony of Padua, Jersey City, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the judges of the United States Circuit Court of Appeals for the Third District.

Now therefore, the condition of this obligation is such that if the Roman Catholic Church of St. Anthony of Padua, Jersey City, shall prosecute said appeal to effect and answer all costs if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

In witness we have hereunto set our hands and seals and the seal of said corporation this 26th day of September, in the year of our Lord nineteen hundred and thirteen.

(Signed) ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA, JERSEY CITY.
By BOLESLAW KWIATKOWSKI, *Secretary.*

(Seal of Church of St. Anthony of Padua, Jersey City.)

BOLESLAW KWIATKOWSKI. [SEAL.]

Subscribing witness—
ISAAC GROSS.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on this 26th day of September, in the year of one thousand nine hundred and thirteen, before me the subscriber, a master in chancery of said State, personally appears Boles-

law Kwiatkowski who, being by me duly sworn, doth depose and make proof to my satisfaction that he is the secretary and well knows the corporation seal of the Roman Catholic Church of St. Anthony of Padua, Jersey City, the corporation named in the bond hereunto annexed. That the seal thereunto affixed is the proper corporate seal of the said corporation that the same was so affixed thereto and the said bond signed and delivered by him, who was at the date — execution thereof the secretary of said corporation, in the presence of said deponent, as the voluntary act and deed of the said corporation; and that deponent thereupon signed the same as a subscribing witness.

BOLESLAW KWIATKOWSKI.

Sworn to and subscribed before me at Jersey City, N. J., the date aforesaid.

ISAAC GROSS,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on this 26th day of September, in the year of our Lord Nineteen Hundred and thirteen, before me the subscriber, a Master in Chancery of the State of New Jersey, personally appeared Boleslaw Kwiatkowski, who I am satisfied, is the surety mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

ISAAC GROSS,
Master in Chancery of New Jersey.

I hereby certify that I am personally acquainted with Boleslaw Kwiatkowski, the surety to the foregoing bond and with his financial responsibility, and that I know him to be worth more than double the penalty of said bond over and above his debts and liabilities in real property in Hudson County, New Jersey, not exempt by law from execution.

ISAAC GROSS,
Master in Chancery of New Jersey.

The within bond approved as to form and sufficiency.

(Signed) JOHN B. MCPHERSON,
Justice United States Circuit Court of Appeals, Third District.

Endorsed: No. 1734. Bond on Appeal. Received and Filed Sept. 30, 1913. Saunders Lewis, Jr., Clerk.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To the Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court holden the city of Washington, District of Columbia on the 14th day of October, nineteen hundred and thirteen, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Third District wherein the Roman Catholic Church of St. Anthony of Padua, Jersey City is appellant and the Pennsylvania Railroad Company is respondent to show cause if any there be why the judgement on said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

JOHN B. MCPHERSON,
Circuit Judge.

Witness — — —, judge of said Circuit Court of Appeals, this 27 day of Sept. in the year of nineteen hundred and thirteen.

FRANK M. HARDENBROOK,
Sol. for Com'p't.

Endorsed: No. 1734. Citation issued. Sept. 26, 1913. Saunders Lewis, Jr., Clerk.

[Endorsed:] 1734. United States Circuit Court of Appeals for the Third District. Roman Catholic Church of St. Anthony of Padua, Jersey City, Comp't & App'l, Aqt. The Pennsylvania Railroad Co., Def't & App'ee. In Equity. Citation. Frank M. Hardenbrook, Att'y for Comp't & App'l, 15 Exchange Place, Jersey City, N. J. Service of copy admitted Octo. 3, 1913. Vredenburgh, Wall & Carey, Att'ys for def't.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To the Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court holden the city of Washington, District of Columbia on the 14th day of October, nineteen hundred and thirteen, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Third District wherein the Roman Catholic Church of St. Anthony of Padua, Jersey City is appellant and the Pennsylvania Railroad Company is respondent to show cause if any there be why the judgement on said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

JOHN B. MCPHERSON,
Circuit Judge.

Witness — — — — —, judge of said Circuit Court of Appeals, this 27 day of Sept. in the year of nineteen hundred and thirteen.

FRANK M. HARDENBROOK,
Sol. for Com'p't.

Endorsed: No. 1734. Citation issued Sept. 26, 1913. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court, in the case of Roman Catholic Church of St. Anthony of Padua, Jersey City, N. J., Appellant, and Pennsylvania Railroad Company, Appellee, No. 1734, March Term, 1913, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Second day of October, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States the one hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 23,890. U. S. Circuit Court Appeals, 3d Circuit. Term No. 739. The Roman Catholic Church of St. Anthony of Padua, Jersey City, appellant, vs. The Pennsylvania Railroad Company. Filed October 10th, 1913. File No. 23,890.

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Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. [redacted] 265

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF
PADUA, JERSEY CITY,

Plaintiff and Appellant.
versus

PENNSYLVANIA RAILROAD COMPANY,

Defendant and Respondent.

Appeal to the United States Supreme Court from the
Third Circuit.

Appellant's Brief in Opposition to Motion to Dismiss Appeal.

MARSHALL VAN WINKLE,

Attorney for Plaintiff and Appellant.



In the Supreme Court of the United States.

ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA, JERSEY
CITY,

Plaintiff and Appellant,

v.s.

PENNSYLVANIA RAILROAD COM-
PANY,
Defendant and Respondent.

No. 739.

**APPEAL TO THE UNITED STATES SUPREME
COURT FROM THE THIRD DISTRICT.**

Brief in Opposition to Motion to Dismiss Appeal.

The motion to dismiss the appeal herein, is based exclusively upon the ground that the jurisdiction of the Circuit Court (now the District Court), for the District of New Jersey, was invoked *solely upon the ground of diverse citizenship*. This is not the fact. The action is predicated upon the fact that the acts of the defendant constitute a taking of private property without compensation, in violation of the provision of the Constitution of the United States.

It is alleged in paragraph XI. of the complaint "that the said acts of the defendant have taken from your orator property consisting of the easement of light and air to which your orator is legally entitled, and deprives it of the same without due process of law, and without just compensation, or any compensation whatever, and that such acts of the defendant in such interference with and appropriation of said property of your orator has been, and

now is, a violation of the provisions of the Constitution of the United States.

While reference to the Constitution in the complaint is not sufficient to invoke jurisdiction, the facts as alleged in the complaint of the acts of nuisance committed by the defendant, *the evidence of which is entirely undisputed in the record*, show conclusively that the acts of the defendant in permitting black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives to fall upon or enter into the premises and structures of the complainant in such appreciable quantities as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the same by the complainant and the priests connected therewith, the teachers and children connected with the school and persons using the said respective structures of the complainant.

And that such acts seriously interfered with light, causing annoying and irritating flashes as the sun strikes the said smoke, soot and gases so in the air; injuring, damaging and destroying the carpets, curtains, furnishings, pictures and decorations contained therein; blackening, discoloring, damaging and destroying the roofs of said structures and the paint upon the inside and outside thereof, and clogging, corroding, perforating and damaging the leaders and gutters leading from said roofs, and depriving your orator of the use of the outside of some of the said structures for laundry purposes, thereby causing complainant great damage and expense, and which acts at all times, aforesaid, have impregnated, contaminated and rendered impure, corrupt, offensive, unwholesome and unhealthful the air in and around the premises and structures of your

said orator, depriving it and the congregation and ten thousand members of said church, and the visitors thereto and the priests connected therewith, as well as the twelve hundred schollars, pupils, as well as the teachers connected with and attending the said school, of the use and comfortable enjoyment of the same, to which they are legally entitled; injuring, damaging and destroying their clothing, and the said premises and structures of the complainant have been, and are now being, seriously injured and rendered uncomfortable and less desirable for church, school or residence purposes, and the health, comfort and rest of said priests, pupils, teachers and members of said church seriously impaired, threatened and injured, and the reasonable use of the same interfered with and impaired.

That the priests connected with the said church have been frequently compelled to suspend church services, and the teachers in the school compelled to suspend school exercises, all of which appears from the uncontradicted and undisputed testimony in the case.

I.

The aforesaid acts have been held by this Court to constitute a taking of private property without compensation, within the provisions of the Federal Constitution.

In *Muhlker vs. R. R.*, 197 U. S., pp. 544-571, this Court held: "We certainly can estimate the difference between a building with a full access of light and air, and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more conspicuous right, has the importance and assertion of community interest and ownership. property has a

certain dominance, but it is more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership, and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed not only by the elevated railroad case, but by other cases." They are collected in 1 Lewis, Eminent Domain, p. 91 E., and it is there said: "Established beyond question the existence of these rights or assessments of light and air, and access appurtenant to abutting lots, and that they are as much property as the lots themselves."

"To take or repair these is to take the right of exclusion. Logically there is a partial taking of the lot, as much as if one corner was cut odd and the same rule of compensation may be applied." Lewis on Eminent Domain, R. 204.

"In legal effect the nuisance resulting from the use made of these structures by the defendant constitute a partial taking of the property of the plaintiff, for which compensation must be made." Sedgwick on Const. Law., 2d Ed. page 262-3.

"To hold that if the government refrains from the absolute conversion of said property to the use of the public it can destroy its value entirely, can inflict irreparable injury, and because in the narrowest sense of the word, it is not taken, would pervert the constitutional provision." Ibid.

"To effectively impair the usefulness of property is a taking within the meaning of the constitution."

Pummelly vs. Greenbay Co., 80 U. S., 166,
167.

Whatever prevents the comfortable use of the property for that purpose by the members of the congrega-

tion or those who by its permission, unite with them in the church, is a disturbance or annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult. The purpose of the organization is thus thwarted. It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purpose to which it was devoted." B. & P. R. R. Co. vs. First Baptist Church, 108 U. S., 317.

"To take away the essential use of property is to take the property itself, and to do this is beyond the power even of sovereignty, except by a proper proceeding to that end."

Cartin vs. Benson, 222 U. S., 78.

"Rights as regards real property, to light and air, to be undisturbed by nuisance by the unreasonable use of neighboring property, are rights where ever they exist, and to the extent to which they are secured by law, are part and parcel of the owners property in land." Lewis on Eminent Domain, 2d Ed., Sec., 54, p. 56. "Whenever the lawful rights of an individual in the possession, use or enjoyment of his land are in any way abridged or destroyed by reason of the exercise of the power of eminent domain, his property is *pro tanto* taken and he is entitled to compensation." Ibid., Sec. 56, p. 58. "Thus, if the city takes a lot adjacent to my own, and under proper authority erects work thereon, the operation of which necessarily fills my premises with noxious gases whereby my land is depreciated in value, I am entitled to compensation." Ibid., p. 59. "If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove in point of fact that the owner is deprived of property, though

a particular piece of property may not actually be taken." Ibid., Sec. 57, p. 61. Sedgwick on Const. Law, 2d. Ed., p. 462, 463.

"A partial destruction or diminution in value is a taking." Glover vs. Powell, 10 N. J. Eq., 211.

"Whenever the exercise of a right operates to destroy an easement incident to real property or amounts to an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, this is a taking of property. There need not be an exclusive appropriation of the property, but such an interference with the beneficial use thereof as operates an essential abridgement of the owners rights incident to, and an essential part of the estate.

"There can be no question that the erection of gas works or the setting up of any noxious trade in the vicinity of any premises that emit noxious odors, which are sent over my lands in quantity and volume sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life so as to constitute a legal nuisance, is a taking of my property, as the Legislature may not permit, without compensation. What possible distinction can there possibly be between the actual taking of my property, or a part of it, and occupying it for the erection of a railroad tract or a gas house, and invading it by an agency that operates as an actual abridgement of its beneficial use, and possibly a complete and practical ouster. There certainly can be none. By the erection of such works a burden is imposed upon my property; the property itself is actually invaded by an invisible, yet pernicious agency, that seriously impairs its use and enjoyment as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over my

land is an invasion of a natural right, a right incident to the land itself and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water; it is an incident to the land annexed to any part of it, and is as sacred as my right to the land itself. Therefore, I apprehend that the Legislature has no power to shield one from liability, for all the consequences of the exercise of an occupation that produces such results, any more than it has to authorize the flooding of my land, or the permanent diversion of a stream." Wood on Nuisance, Sec. 762, p. 1093, and cases cited.

In Beach vs. I. Z. Co., 54 N. J. Eq., 65 (aff'd. 55 N. J. Eq., 824), the Court held that "Maintenance of a nuisance to real estate amounts to a taking of private property and cannot be legalized by the Legislature even upon terms of compensation."

"Where the right of the claimant is clear, and the facts undisputed a Court of Equity is bound to give preventative relief. To refuse is to allow the defendant to take the complainant's property upon terms of paying such compensation from time to time as the jury may assess."

"It was suggested that in this case no injunction should be ordered, but that the complainants should be left to their action at law for damages. I am unable to adopt that view. It must be considered as settled law in this State that maintenance of a nuisance of the kind here in question is, in effect, taking of property" (Penn. R. R. Co. vs. Angel, 14 Stew. Eq., 316-329). Where Judge Dixon, speaking for the Court of Errors and Appeals, says:

"This principal rests upon the express terms of the Constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the posses-

sion of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noises so that it cannot be occupied in comfort, you equally take away the owner's property."

"In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion; this is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property.

See also Baltimore vs. 1st Baptist Church, 137 U. S., 568-573, and also cases collected and submitted to this Court in the complainant's brief on motion to advance this cause, pages 3-12.

II.

The statement in brief of counsel in support of motion to dismiss this appeal, to the effect that "if the allegation of the fact of diverse citizenship had been omitted from the bill, the jurisdiction of the Circuit Court as a Court of the U. S., could not have been maintained," is entirely erroneous and not founded on the facts.

III.

The appellant believes that *the motion to dismiss the appeals should be denied*. A duly certified copy of the record, consisting of 489 pages, together with thirty printed copies of the same, have been filed in this Court and the case is No. 739 on the docket of this Court on the appeal for October Term, 1913, after the allowance of the appeal herein by the Circuit

Court. If, however, the Court should decide that under the law the appeal herein should be dismissed, WE RESPECTFULLY ASK THAT THIS COURT GRANT THE COMPLAINANT'S PETITION FOR A WRIT OF CERTIORARI, AND RETAIN THIS CASE TOGETHER WITH THE PRINTED RECORDS NOW ON FILE, AS A RETURN UPON A *writ of certiorari*.

Respectfully submitted,

MARSHALL VAN WINKLE,
Of Counsel with the Complainant.

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Office Supreme Court, U. S.
FILED
NOV 15 1913
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF
PADUA, JERSEY CITY,

Petitioner,
versus

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

No. ■■■ 289

Petition for Writ of Certiorari to the United States Circuit
Court of Appeals for the Third Circuit.

MARSHALL VAN WINKLE,
Attorney for Petitioner,
1 Exchange Place,
Jersey City, N. J.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 739.

ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA, JERSEY
CITY,
Petitioner.

v.s.

THE PENNSYLVANIA RAILROAD
COMPANY,
Respondent.

Petition for Writ of Certiorari to the United
States Circuit Court of Appeals for the
Third Circuit.

NOTICE.

The above respondent is hereby notified that the above named petitioner will, on Monday, the 1st day of December, 1913, at the opening of Court on that day, or as soon thereafter as counsel can be heard, submit a motion to the Supreme Court of the United States, in its Court room at the Capitol, in the City of Washington, District of Columbia, upon its verified petition for a writ of certiorari and a copy of the entire record in the cause in said petition and motion designated, a copy of which motion and petition for writ of certiorari, are herewith delivered to you.

MARSHALL VAN WINKLE,
FRANK M. HARDENBROOK,
Solicitors for Petitioners.

Receipt of copies of the foregoing notice of said motion, and the said petition for writ of certiorari, is hereby acknowledged.

Nov. 14, 1913.

JAMES B. VREDENBURGH,
Solicitor for Respondent.

MOTION.

Now comes The Roman Catholic Church of St Anthony of Padua, Jersey City, by Marshall Van Winkle and Frank M. Hardenbrook, its counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, require said Court to certify to this Court, for its review and determination, a certain cause in said Circuit Court of Appeals lately pending, wherein upon an appeal to said Circuit Court of Appeals from a final decree entered on the 15th day of February, 1913, in favor of the defendant, The Pennsylvania Railroad Company, and in which the Roman Catholic Church of St. Anthony of Padua, Jersey City, (this petitioner) was the appellant, and the Pennsylvania Railroad Company was appellee, and to that end tenders herewith its petition, together with a certified copy of the record in said cause.

MARSHALL VAN WINKLE,
FRANK M. HARDENBROOK,
Solicitors for Petitioner.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third District.

Comes now the Roman Catholic Church of St. Anthony of Padua, Jersey City, a corporation, the

above named petitioner, and shows to this Honorable Court that on, to wit, the 27th day of July, 1910, there was filed in the Circuit Court of the United States for the District of New Jersey a bill in equity by your petitioner against the Pennsylvania Railroad Company, wherein it is alleged that :

1st. That your petitioner is a religious corporation engaged in religious, educational and charitable work since 1884, upon the lands and premises hereinafter described, and owned by it.

2nd. That the defendant was duly incorporated under the laws of the State of Pennsylvania on April 13, 1846, as a common carrier, with authority to lease, hold and operate a line of railway in the States of Pennsylvania and New Jersey, and as such at all times hereinafter mentioned has maintained and operated and still maintains and operates a railroad, with its main and side tracks, locomotives, freight and passenger cars upon what is known as Sixth street, Jersey City, Hudson county.

3rd. That on December 20, 1884, petitioner became, and from thence, hitherto has been, and now is, the owner in fee simple absolute of those three lots in said city of Jersey City, numbered, 5, 6 and 7 in block 390 on Bacot's map of Jersey City, made in 1861, and on file in the office of the register of said county of Hudson. Said lots being 25 ft. wide in front and rear, and 100 ft. in depth throughout, and front on the the westerly side of Monmouth street, and immediately thereafter your petitioner erected thereon, at a large cost, a church edifice and since which time your petitioner has held continuously religious services therein.

4th. That on May 10, 1893, your petitioner became, and from thence hitherto has been, and now

is, the owner of land in the city of Jersey City, and known as lot 9 in block 250, now city block 390, being on the north side of Sixth street and Monmouth street, 25 ft. by 100 ft. on map of town of Ahrasimus, made by Joseph Margin and filed in the office of the County of Bergen, 1884, and your petitioner erected thereon at a large cost, a residence for the priests connected with said church, and since which time said residence has been continuously occupied as a home by the said priests.

5th. That on June 11, 1898, your petitioner became, and from thence hitherto, and now is, the owner of 4 certain lots in the city of Jersey City, and known as lots 17, 18, 19 and 20, in block 250, map of heirs of J. B. Coles and Bagot map running along Brunswick street 100 ft.; thence southerly 100 ft.; thence easterly parallel with Sixth street; thence westerly 100 ft. and immediately thereafter your petitioner erected thereon a parochial school for educational purposes, and since which time the said school building has been continuously used as a school for upwards of 1,100 children.

6th. That August 8, 1902, your petitioner became, and from thence hitherto has been, and now is, the owner of a certain lot of land on the northerly side of Sixth street in the city of Jersey City, and being 25 ft. wide in front and rear by 100 ft. in depth, and known and designated as lots 10 in block 390 upon a map of Jersey City filed in office of register of Hudson County, 1861, and known as the Bacot map, and immediately thereafter your petitioner erected thereon an addition to the residence of the officiating priests connected with your petitioner's said church.

7th. That on March 20, 1905, your petitioner became the owner of certain lot of land on the southerly side of Seventh street, in the city of Jersey City,

25 ft in width front and rear, and 100 ft. in depth, and known as lot 31 in block 250, as appears on map of lands of the heirs of J. B. Coles on file in office of register of Hudson County.

8th. And that immediately after becoming the owner of the last mentioned lands, your petitioner erected, at a large expense, a home and residence for the sister and female teachers connected with the said church and school so erected by your petitioner, as aforesaid, and since which time said residence has been continuously used and occupied as a home by the sisters and female teachers.

9th. That the said buildings so erected by your petitioner are of substantial and costly construction, and which are, except for the acts of the defendant, hereinafter stated, convenient, pleasant and healthful, and only adapted and used for the respective purposes aforesaid, and that the immediate neighborhood of the same has long been, and now is thickly populated and exclusively a residential district.

10th. That defendant for upwards of the six last years past in the operation of its said railroad has maintained and operated upon said Fifth street and immediately to the south of said lands and structures of your petitioner, a line of railroad tracks upon which it operates a great number of freight and passenger trains, cars, switch engines and locomotives, which continuously at all hours of the day and night pass upon said tracks, the lands, premises and structures of your petitioner as aforesaid, each making its characteristic noises, and which locomotives attached to said trains and engines connected therewith are now burning, and for upwards for the past six years have continuously burned, vast quantities of which is known as soft or bituminous coal, and from the burning and partial combustion

of which there arises and continuously for upwards of the past six years has arisen from the smoke-stacks connected with said locomotives and engines large and dense volumes of black smoke, soot, cinders, carbon, ashes, particles of unconsumed coal, coal dust and noxious, unwholesome gases, offensive odors and vapors, which are carried to, over, into, upon and through the lands, premises and structures of your petitioner so owned, used and occupied by it as aforesaid, discoloring the glasses, thereby seriously interfering with light, and causing annoying and irritating flashes as the sun strikes the said smoke, soot and gases so in the air as aforesaid; injuring, damaging and destroying the carpets, curtains, furnishings, pictures and decorations contained therein; blackening, discoloring, damaging and destroying the roofs of said structures and the paint upon the inside and outside thereof, and clogging, corroding, perforating and damaging the leaders and gutters from said roofs and depriving your petitioner of the use of the outside of some of said structures for laundry purposes, thereby causing your petitioner great damage and expense, and which now are and at all times aforesaid have impregnated, contaminated and rendered impure, corrupt, offensive, unwholesome and unhealthful the air in and around the premises and structures of your petitioner, depriving it and the congregation and members of said church, and the visitors thereto and the priests connected therewith, as well as the scholars, pupils and teachers connected with and attending said school of the use and comfortable enjoyment of the same to which they are legally entitled, injuring, damaging and destroying their clothing, and the said premises and structures of your petitioner have been and now are being seriously injured and rendered uncomfortable and less desirable for church, school or residence

purposes and health, comfort and rest of said priests, pupils, teachers and members of said church seriously impaired, threatened and injured and the reasonable use of the same interfered with and impaired to the damage of your petitioner \$50,000.00.

11th. That said acts of defendant have taken from you petitioner property consisting of the easement of light and air to which your petitioner is legally entitled, and deprives it of the same without due process of law, and without just compensation, or any compensation whatever, and that such acts of defendant in such interference with and appropriation of said property of your petitioner has been, and now is, a violation of the provisions of the Constitution of the United States.

12th. That the use, acts, occupation and appropriation by defendant constitute a nuisance to and one of special injury to your petitioner, and are unnecessary, avoidable, and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad, and which acts are continous, and which will cause great and irreparable loss to your petitioner and subject it to the prosecution of a multiplicity of suits for damages unless the defendant be restrained by injunction from the commission thereof.

13th. All of which acts and doings of the said defendant are contrary to equity and good conscience, and tend to the manifest injury and oppression of your petitioner in the premises.

The answer of the defendant alleged:

1st. The defendant answering paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of said bill of complaint, says: That they do not know and cannot set forth as their belief or otherwise whether the statements of facts

set forth in said paragraphs of said bill are true; but they have no reasons to doubt that the complainant is, and, since 1884 has been engaged in religious and educational work upon a portion of the land described in bill of complaint, and has erected thereon building of a substantial construction.

2nd. Answering paragraph 2 of complaint, say: That they admit the statement as to the incorporation of the defendant as a common carrier; and their authority to lease, hold and operate a line of railroad in the States of Pennsylvania and New Jersey. But they deny that they, as such, or in any other capacity, and at all the times or any of the times mentioned in the bill of complaint, or at any time have maintained or operated a railroad with its main or side tracks, locomotives, freight or passenger cars, upon what is known as Sixth street, Jersey City, Hudson County, New Jersey.

3rd. The defendant, answering paragraphs 10, 11 and 12 of complaint, says: That they deny the truth of the statements set forth in said paragraphs, and of each and every one of said statements; and they say that they never have maintained or operated, and do not now operate any railroad upon Sixth street in Jersey City, and that they have not for upwards of six years last past, in the operation of their railroad, maintained or operated upon said Sixth street a line of railroad tracks, or any freight or passenger trains or cars or switch engines or locomotives of any kind or character.

The defendant says that, under their charter rights and in the execution of their powers, and by force and virtue of the several acts hereinafter mentioned, they did survey, lay out and locate their railroad on the several courses set down in such survey, and did construct a railroad between the points in the said acts set forth; and that after the con-

struction of said elevated railroad, the defendant, in order to carry into effect the objects of the incorporation of the united companies hereinafter mentioned, did use the said railroads so constructed on its surveyed route, in the prosecution of their said business as a common carrier of passengers and freight, and continued the same during the times mentioned in the said declaration, and a long time prior thereto, as hereinafter mentioned, as they lawfully might do, for the causes aforesaid; and did necessarily operate thereon a great number of freight and passengers trains, switch engines and locomotives, and did thereby necessarily create some small and some noise, and did necessarily shift and distribute their cars, and did necessarily blow the whistles of their locomotives, and did necessarily start and stop with trains of cars and back them and start them again, and that each did necessarily make their characteristic noises; and did necessarily cause noise, smoke and vibrations, as they lawfully might do for the causes aforesaid.

4th. The defendant further answering, says: That the Legislature of the State of New Jersey, by an act entitled, "An Act to incorporate the New Jersey Railroad and Transportation Co.," passed March 7, 1832, (P. L., page 96), created the New Jersey R. & T. Co., a body politic and corporate, to exercise all the powers and privileges pertaining to corporate bodies and necessary for the purposes of said act; and with all the rights and powers necessary to the construction of a railroad with as many sets of tracks as they may deem necessary, from a point in the City of New Brunswick to a point on the Hudson River, opposite the City of New York, and to take possession of any land needed for the site of the said road, and to acquire the same by purchase or condemnation in fee simple, with power, when said railroad

was constructed, to charge tolls and rates for the passage of all carriages upon said railroad, and to make regulations for the collections and levying of the same; and to regulate the time and manner for transporting goods and passengers, and for collecting tolls on the said railroad; and also to use thereon engines and carriages of their own for the transportation of persons or any species of property; but at the end of thirty years, the State might take the said railroad at an appraised value. That, immediately after the passage of said act, the said N. J. R. R. & T. Co., surveyed and filed the route of their railroad from the City of New Brunswick to Jersey City, opposite the City of New York, and acquired the lands and constructed a road thereon, in accordance with the terms of the above act; and in the month of September, 1834, opened said railroad as a public highway for the transportation of property and persons between the said terminal, and have since maintained and operated said railroad up to the time of the execution of the lease hereinafter mentioned.

5th. The defendant, further answering, says: The State of N. J., by an act entitled, "An Act to enable the United Railroad and Canal Companies to increase their depot and terminal facilities at Jersey City," approved Mar. 30, 1868, (P. L. page 551*), empowered the said N. J. R. & T. Co. and the United Delaware and Raritan Can. Co., and the Camden & Amboy R. & T. Co., to acquire from the State the land under water in Harsimus Cove, in Jersey City, lying between high water mark on the west, the deep water of the Hudson River on the east, the center of South Second St., on the north, and the center of South Second St. on the south, in the name of the N. J. R. & T. Co., and to fill up and improve the same, and erect wharves, piers,

store houses and other buildings and sheds and car and engine houses and appendages, and to build a branch railroad not exceeding one hundred feet in width, from said property so purchased as aforesaid, to some point of the present line of the N. J. R., eastward of the deep cut in Bergen Hill, with as many separate tracks and rails as the directors shall deem necessary; with power to procure the right of way for such branch railroad, either by purchase or by appraisement, in the manner described by the original charter, and to make such branch railroad elevated so as to pass over the streets of said city, at least 12 ft. in the clear above said streets, in consideration of a sum of money to be paid by said companies to the State of New Jersey the amount of which was to be ascertained by the Attorney General and 3 commissioners to be appointed by the Supreme Court.

That subsequently the Attorney General and said 3 commissioners did ascertain that the amount which the said companies should pay to the State of New Jersey for the lands and powers granted by the said last mentioned act, was the sum of \$5,000; thereupon the said N. J. R. & T. Co., and the other companies paid to the State of N. J. the said sum of \$5,000, and thereafter made a survey of said branch line and filed the route thereof in accordance with law, and, at great expense, acquired from the owners thereof for the purposes of such branch railroad, as provided by said act, a route 100 ft. wide, from a point on the N. J. R. & T. in the deep cut in Bergen Hill, to said lands in the Harsimus Cove, and constructed and built on said route an elevated railroad; and thereafter erected on the said lands in Harsimus Cove a terminal yard in connection with said branch railroad, with wharves, sheds and a grain elevator, warehouses and tracks,—all at great

expense; and these defendants commenced to operated the said branch of railroad and terminal yard on or about the first day of May, 1872, which work was done and expenditure made with the full knowledge of and without objection from the owners of all the lands set forth in said bill of complaint.

6th. And the defendant, further answering, says: That on or about June 30th, 1871, the Delaware and Raritan Canal Co., the Camden and Amboy R. & T. Co., and the N. J. R. & T. Co. (commonly called the United Railroad and Canal Companies), by indenture bearing date that day, did grant, demise and to farm let unto the Pennsylvania Railroad Co., the above-named defendant, all their railroads and appurtenances and real and personal property, including the said Harsimus Cove property and the said branch line leading thereto, for the full term of 990 years, unless sooner terminated by default in the payment of the rent and taxes.

That an act entitled, "An act to validate and confirm a certain lease and contract between the companies now known as the United Railroad & Canal Co., and the Pennsylvania R. R. Co., the said lease was validated, ratified and confirmed, which act was approved March 27, 1873 (Laws, page 1298).

That defendant has been in possession of the property of the N. J. R. & T. Co. and the United Jersey Railroad and Canal Co., including the said land at Harsimus Cove to the main line in Bergen cut, under said lease, as lessee thereof, since the year of 1871, and are now in such possession under said lease, and have been during all the time and still are using and operating the same for the transportation of goods and passengers in and across the State of New Jersey from the city of Philadelphia to the city of New York. That the transportation of goods over the said branch line, since said lease,

has been very large and has required the constant use of the same.

7th. And the defendant, further answering, says: That the N. J. R. & T. Co. acquired the said land for said route to Harsimus Cove, as filed in the office of the Secretary of State, prior to the year 1873, in accordance with the terms of said charter; and that some of the persons from whom they acquired said land were at that time also the owners of the lands set forth in the bill of complaint, and that said owners granted to the N. J. R. & T. Co. the lands in the said route, for use by them and by this defendant as a railroad company in operating and maintaining a railroad thereon in the way and in the manner in which said railroad is now maintained and operated, and that prior to the year 1873 the defendant operated said railroad on said route, as filed in the office of the Secretary of State, as said railroad is now operated, and they have, ever since the year 1873, in the same way and manner, maintained and operated said railroad over said land within said route; and that, from the year 1873, up to the present time, the defendant has, by force of the franchise of the N. J. R. & T. Co., above mentioned, derived from the above-mentioned public grants, maintained and operated their railroad and run their trains, carrying merchandise and freight within said route, doing no more damage to the lands adjacent to said route than that which necessarily results from the transaction of such acts and business.

8th. And the defendant further answering, says: That by an act entitled "An act concerning public utilities, to create a Board of Public Utility Commissioners, and to prescribe its duties and powers," approved April 21st, 1911, it was, and other things, enacted that the Board provided for by said act

should have general supervision and regulation of, and jurisdiction and control of all public utilities, and also over their property, property rights, equipments, facilities and franchises, as far as might be necessary for the purposes of carrying out the provisions of said act, and should, among other things, have power to investigate, upon its own initiative, or upon complaint in writing, any matter concerning any public utility as defined by said act included every corporation which operated or maintained or controlled within the State of New Jersey any steam railroad.

9th. And the defendants aver, in addition to the foregoing answer, that they have, for over thirty years, and since the said Legislature grant, has actual possession of the lands in said route, uninterruptedly, and have uninterruptedly continued to operate their trains, cars, switch engines and locomotives over the said railroad in the same way and manner as they now maintain and operate the same; and aver that they acquire, both by statute and prescription, the right to do so; and pray that they might have the same benefit therefrom as if they had formally pleaded the same.

10th. The defendants deny that they have in any way infringed upon the rights of the complainant as alleged in the said bill of complaint, or otherwise, and deny that the complaint is entitled to any relief whatever, or to any part of the relief in said bill of complaint demanded; and allege that the complaint has no standing in this Court or in any Court of Equity.

And the defendant prays in all things the same benefit and advantage of this their answer, as if they had pleaded to said bill of complaint.

And the defendant denies all and all manner of

'unlawful acts whatsoever, whereof they are in any-wise by the said bill of complaint charged.

Testimony was thereupon taken and the case submitted and argued before the said U. S. Court for the District of New Jersey on June 5, 1912, and on Feb. 4th, 1913, the said Court decided the said case, by dismissing your petitioners bill without opinion. An appeal was taken from this decree to to the U. S. Circuit Court of Appeals for the Third Circuit, and the case was heard and submitted to the Court on August 26, 1913, and rendered its opinion and affirmed the decision of the U. S. Court for the District of New Jersey. The Circuit Court of Appeals held, "That if the defendant's railroad was maintained and operated upon Sixth street, that there would have been a taking of complainant's property without compensation and entitle it to an injunction against the operation of such road until such compensation had been ascertained and paid conformably to the doctrine of the N. Y. Elevated Railroad cases." But there can be no recovery if the railroad was on private property and not on a public street.

The Circuit Court in affirming the judgment held, that "there can be no recovery for annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad from its non-negligent and careful operation," and "that a defendant is liable only to those injured thereby, where such damages are the result of want of due care and skill in the conducting and operation of the railroad."

And following the Beseman case, "That the complainant cannot recover for elements of damage and nuisance committed by defendant, even though they amount to a taking of private property without compensation, unless complainant has shown

that the damages sustained are due entirely to negligent acts of the defendant, and private property may be taken without compensation in all cases, provided it is taken with the exercise of care and caution and not through negligence."

"In the absence of the determination in a suit at law as to the fact of negligence by the defendant in the operation of its railroad, a Court of Equity would be embarrassed in undertaking to adjourn the defendant against the issuing of more soot and cinders than was necessary to the careful and proper operation of its road, and that such a decree would be futile and unenforceable."

Thereafter an appeal was prayed from the decree of the Circuit Court of Appeals to the Supreme Court of the U. S., and such appeal has been granted, and a duly certified copy of the record with thirty printed copies thereof filed in this Court. In order that its rights may be fully protected, *your petitioner also prays for a writ of certiorari*, and your petitioner respectfully complains that great and manifest error appeareth in said decision of the Circuit Court of Appeals, as to each and every proposition by it announced as hereinbefore recited and as appears therein, and alleges for such error the following:

1st. That the said Circuit Court erred in adjudging that the defendant had not taken from your petitioner property without compensation and without due process of law, and even though the acts amount to a taking of private property without compensation, your petitioner must establish that such taking was due entirely to negligent acts of the defendant.

2nd. That upon the undisputed facts appearing in the record, your petitioner failed to show acts of nuisance entitling it to a relief.

3rd. The Court erred in holding that your peti-

tioner was not entitled to an injunction and damage upon the undisputed testimony.

4th. That the Court erred in its opinion in various other respects apparent upon the face thereof.

Wherefor, your petitioner prays that a writ of certiorari be issued under the Seal of the Court, directed to the U. S. Circuit Court of Appeals for the Third Judicial Circuit, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of said Court had in said cause, to the end that the cause may be reviewed and determined by this Honorable Court, as provided by the act of Congress approved March 3, 1891, and March 3, 1911, and that said decree of the Circuit Court of Appeals be revised by this Honorable Court, and for such further relief as may seem proper.

And your petitioner will ever pray.

MARSHALL VAN WINKLE,
FRANK M. HARDENBROOK,
Solicitors for Petitioner.

UNITED STATES OF AMERICA, }
DISTRICT OF NEW JERSEY, } ss.
COUNTY OF HUDSON.

BOLESLAW KWIATKOWSKI, being duly sworn on his oath, says, that he is the pastor and secretary of the Roman Catholic Church of St. Anthony of Padua, Jersey City, and that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

BOLESLAW KWIATKOWSKI

Subscribed and sworn to before
me this 14th day of Novem-
ber, 1913.

SAMUEL SILVERMAN,
[SEAL.] Notary Public,
New Jersey.

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Office Supreme Court, U. S.
FILED
NOV 29 1913
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. ~~—~~ 269

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF
PADUA, JERSEY CITY,

Plaintiff and Appellant,

versus

PENNSYLVANIA RAILROAD COMPANY,
Defendant and Respondent.

Petition for Writ of Certiorari to the United States Circuit
Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION TO PETITION.

JAMES B. VREDENBURGH,
Attorney for Defendant and Respondent.



Supreme Court of the United States.

ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA, JERSEY
CITY,

Plaintiff and Appellant,

versus

PENNSYLVANIA RAILROAD COM-
PANY,
Defendant and Respondent.

October Term,
1913.
No. 739.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The printed transcript of the record is now on file in this court on appeal from the Circuit Court of Appeals for the Third Circuit. The appellant has set down a motion to advance the argument of the cause and has also filed a petition for writ of certiorari. The grounds on which the petition last named is based are set forth on page 16 of the petition for the writ of certiorari.

The final decree of the District Court, affirmed by the Circuit Court of Appeals, is as follows:

FINAL DECREE.

(Filed February 15, 1913.)

At the September Term of the District Court of the United States for the District of New Jersey, in the Third Circuit, held at the United

States Court Room in the City of Trenton on the 15th day of February in the year of our Lord One thousand nine hundred and thirteen:

Present—HON. JOHN RELLSTAB, District Judge.

This cause came on to be heard at the April Term of the Circuit Court in the year of our Lord one thousand nine hundred and twelve, and was argued by counsel and was continued for advisement until the present term; and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the defendant has not maintained or operated upon Sixth Street in the City of Jersey City a line of railroad tracks.

That the defendant, operating its road under legislative authority, has not taken, and does not take from the complainant any property to which the complainant is legally entitled.

That the acts of the defendant in the operation of its railroad have not constituted, and do not constitute a nuisance and are not so unnecessary, avoidable and unreasonable as to warrant the issuing of an injunction restraining it from the use of soft or bituminous coal in the operation by the defendant of this railroad.

And it is ordered, adjudged and decreed that the bill of complaint be dismissed and that the defendant be hence discharged with its reasonable costs and charges.

JOHN RELLSTAB,
Judge.

Apparently the appellant's theory in trying to raise the constitutional questions is that in some way those questions are appropriate to the present application for writ of certiorari. Whereas the fact is that the application for the writ is made

out of abundant caution in case the appeal is dismissed. If the appeal is dismissed, it will of course be because the bill of complaint will be held to have presented no ground of Federal jurisdiction other than diversity of citizenship. The question therefore in the present application as to whether the defendant's action is contrary to the Fifth or Fourteenth Amendment, will be irrelevant if the consideration of this application is reached.

The appellant's first reason for the issuance of the writ is:

"1st: That the said Circuit Court erred "in adjudging that the defendant had not "taken from your petitioner property with- "out compensation and without due process "of law, and even though the acts amount to "a taking of private property without com- "pensation, your petitioner must establish "that such taking was due entirely to negli- "gent acts of the defendant. P. 16.

In comparing this reason with the decree, it will be seen that the decree is "that the defendant, operating its railroad under Legislative authority, has not taken and does not take from the complainant any property to which the complainant is legally entitled."

The first reason is made up in part of the excerpt from the decree just quoted, and in part from appellant's characterization of a portion of the opinion of the Circuit Court of Appeals.

If the opinion be excluded from consideration, we have then the record of the final decree of the District Court affirmed by the Circuit Court of Appeals to the effect that no property of the appellant is taken to which it is legally entitled.

Turning from the decree of the court to the claims of the appellant, it is difficult to see how the case differs from the case of any trespass or tort ordinarily dealt with by the State Courts. The appellant's criticism of the opinion, so far as the taking of property without due compensation is concerned and without due process of law, does not fall either within the domain of the Fifth or the Fourteenth Amendment. It is settled that the Fifth Amendment operates solely on the National Government and not on the State.

Barron v. Baltimore, 7 Pet. 243.

Brown v. New Jersey, 175 U. S. 172, 174.

Howard v. Kentucky, 200 U. S. 164, 172.

There is here no action of the Federal Government, nor can the Fourteenth Amendment be invoked for there is no action on the part of the State of New Jersey or its legislative, executive or judicial authorities.

The matter is dealt with in the somewhat similar case of *Marchant v. Penna. R. R.*, 153 U. S. 380. In that case plaintiff brought an action against the railroad company in a Pennsylvania court for recovery of damages to him in the erection of the company's elevated road on the company's property abutting the south side of Filbert Street, Philadelphia, in front of plaintiff's property. The verdict in his favor was taken to the Supreme Court of Pennsylvania and reversed, the action of the State Court being affirmed by this court. The concluding paragraph of the opinion is:

"It should also be observed that the plaintiff does not complain that, by any legislative enactment, she has been denied rights granted to others, but she attributes error

"to the judgment of the Supreme Court of Pennsylvania in construing that provision of the constitution of the state which gives a remedy for property injured by the construction of a railroad, as not extending the remedy to embrace property injured by the lawful operation of the railroad. It is not pretended that by such a construction of the law, the plaintiff has been deprived of any right previously enjoyed. The scope of the remedy added by the constitution of 1874 to those previously possessed by persons whose property is affected by the erection of a public work is declared by the court not to embrace the case of damages purely consequential. In so holding it does not appear to us that the Supreme Court of Pennsylvania has either deprived the plaintiff of property without due process of law, or denied her the equal protection of the law, and its judgment is accordingly affirmed."

The plaintiff is a corporation of New Jersey. It chose as its forum for this suit, the Federal Court, resting jurisdiction on diversity of citizenship. It could have invoked the State law; but how has there been any taking of its property without due process of law, within the Federal Constitution? Apparently the case does not differ, assuming for argument that there had been a taking, from any other taking within the confines of New Jersey. The plaintiff's claim rests on the theory that for every nuisance committed in New Jersey, the Federal power can be invoked, if diversity of citizenship exists, and the taking occasioned by the nuisance will be contrary to the provisions of the Federal Constitution.

The appellant's remaining reasons for the issuance of the writ of certiorari are:

"2nd: That upon the undisputed facts appearing in the record, your petitioner failed to show acts of nuisance entitling it to a relief.

"3rd: The Court erred in holding that your petitioner was not entitled to an injunction and damage upon the undisputed testimony.

"4th: That the Court erred in its opinion in various other respects apparent upon the face thereof."

Evidently the second reason is incomplete. The probability is that it is a criticism of the opinion of the court in the same manner that the third and fourth reasons are.

In any event the questions involved are not of sufficient importance to justify the issuance of a writ of certiorari.

There is nothing final about the dismissal of the bill of complaint. It dealt with the situation existing up to the time of the filing of the bill. If the defendant invades the rights of the plaintiff, the plaintiff can still repair to the courts of the district or State of New Jersey and obtain redress.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

JAMES B. VREDENBURGH,
of Counsel with Respondent.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. ~~7~~ 269

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF
PADUA, JERSEY CITY,
Plaintiff and Appellant,
versus

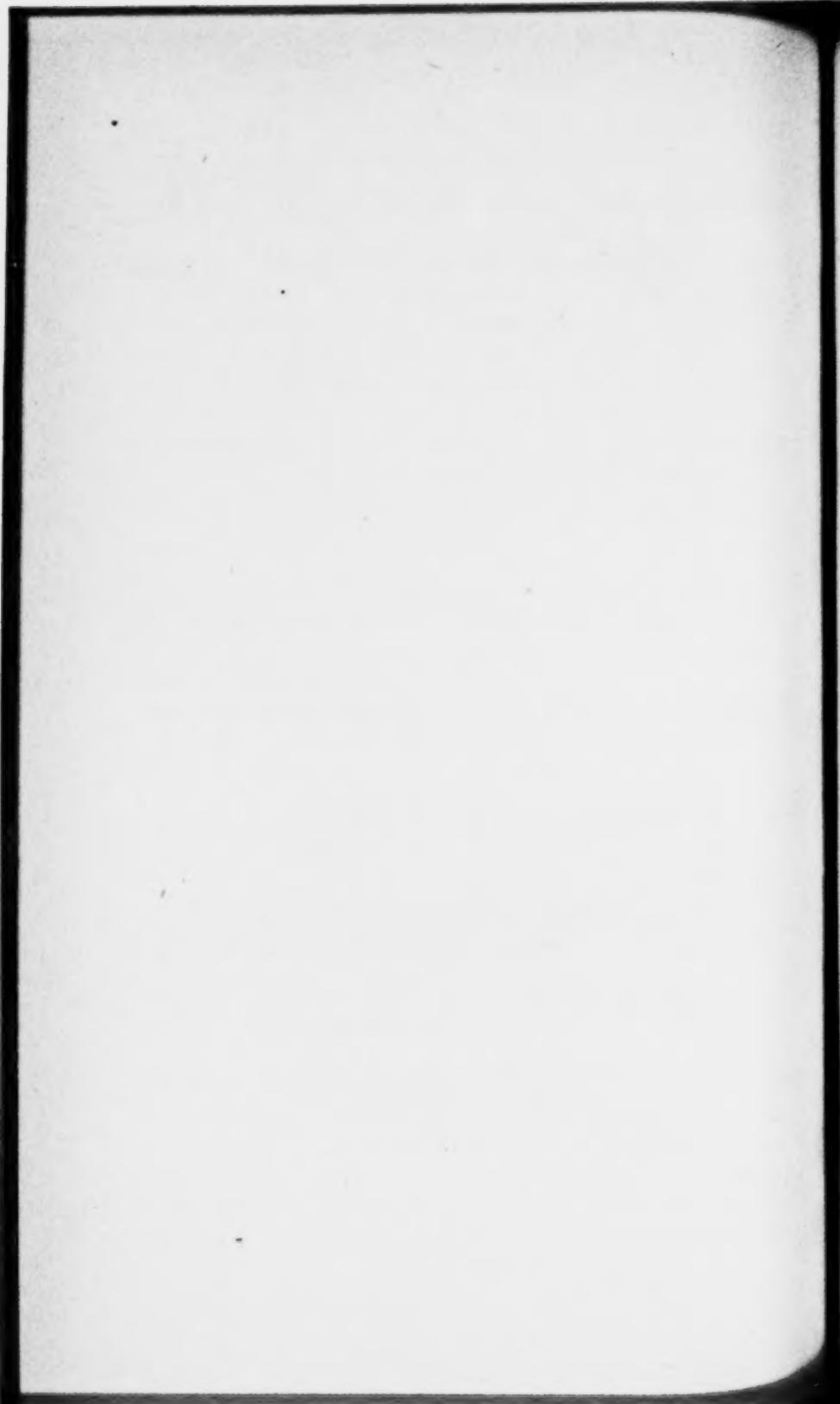
PENNSYLVANIA RAILROAD COMPANY,
Defendant and Respondent.

Appeal to the United States Supreme Court from the
Third Circuit.

MOTION TO ADVANCE CAUSE.

MARSHALL VAN WINKLE,
Counsel for Plaintiff and Appellant.

FRANK M. HARDENBROOK,
Attorney for Plaintiff and Appellant.



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA, JERSEY
CITY,

Plaintiff & Appellant,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant & Respondent.

No. 739.

*On Appeal to
the United
States Su-
preme Court
from the
Third Cir-
cuit.*

Motion to Advance.

Now comes the Roman Catholic Church of St. Anthony of Padua, Jersey City, the appellant, and moves the Court to advance the above entitled cause for hearing at this Term.

The appeal herein is from a final judgment of the U. S. Circuit Court of Appeals for the Third District, entered against the above named appellant on August 26, 1913, and which judgment affirmed a judgment of the U. S. District Court for the District of New Jersey, entered against the above named appellant, February 15th, 1913.

From said judgment of the Circuit Court of Appeals an appeal to this Court has been taken, and is now pending, and is case No. 739 upon the docket of this Court for Oct. Term, 1913.

This motion is made for an order to advance the cause for argument out of its regular order, in accordance with the rules of this Court permitting such advancement in the classes of cases therein mentioned.

The special and peculiar circumstances; upon which the granting of such order is respectfully prayed for are those appearing in the record, showing the nature of the action, the proceedings therein, the annexed affidavits and the question of law involved which are as follows:

This action was brought in equity to obtain an injunction and a judgment for damages for injury to the church property and a taking of its property without compensation by the defendant The Pennsylvania R. R. Co., in Jersey City, Hudson County, New Jersey. The complainant, a church corporation, maintaining a church, rectory and school on the northerly side of Sixth street, immediately opposite an extension of the freight yard and terminal of the defendant on the southerly side of Sixth street, 58 feet distant (fol. 40, p. 116). The church is attended *by upwards of 8,000 communicants and 10,000 regular attendants (fol. 40 p. 115 Record), and the school is attended by upwards of 1,200 scholars (fol. 20, p. 116 Record).*

The taking of the testimony was concluded October 19th, 1911, and the printed record filed very shortly thereafter. The case was argued before the District Court and submitted for decision on June 5th, 1912, *and it was not until February 4th, 1913, eight months thereafter, that the Court dismissed the complaint without opinion, and upwards of two years have elapsed since the taking of the testimony was finished.*

The railroad tracks opposite the church property are a part of defendant's terminus and freight yard, connecting a larger freight yard some few blocks to the west of the church property with a terminus and freight yard some few blocks east of the church property (fol. 10, p. 128, of Record), fol. 10, p. 223, and fol. 10, p. 235, are used continually by passing

and standing freight engines, all of which engines for a period of *six years prior to the commencement of this action and down to the present moment*, have emitted dense volumes of black smoke from the burning of soft coal, and for twenty-four hours each and every day one or more engines stand for a period of time varying from five minutes to an hour immediately opposite the church property *blowing off dense volumes of black smoke, soot, cinders and ashes, which are carried over, into and through the church and school in large quantities, damaging the church and school property to the amount of \$11,552.71, all of which appear by the uncontested testimony and are incontestable facts*, and during which time the services in the church and the teaching in the school are interrupted by the noise of whistles and blowing off of exhaust steam to such an extent that *the priests conducting services in the church are frequently compelled to suspend services (fol. 10, p. 129, Record), and the teachers in the school to suspend their class services several times every day (fols. 20-30, p. 183, Record)*.

These acts of the defendant constitute a continuing nuisance and trespass and a taking of private property without compensation.

The acts of the defendant constitute the taking of private property without compensation.

In Muhlker vs. R. R., 197 U. S., pp. 544-571, this Court held: "We certainly can estimate the difference between a building with a full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more conspicuous right, has the importance and assertion of community interest and ownership, property has a

certain dominance, but it is more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed not only by the elevated railroad case but by other cases. They are collected in 1 Lewis, Eminent Domain, p. 91 E, and it is there said: "Established beyond question the existence of these rights or assessments of light and air, and access appurtenant to abutting lots and that they are as much property as the lots themselves."

"To take or impair these is to take the right of exclusion. Logically there is a partial taking of the lot, as much as if one corner was cut odd and the same rule of compensation may be applied." Lewis on Eminent Domain, R. 204.

"In legal effect the nuisance resulting from the use made of these structures by the defendant constituted a partial taking of the property of the plaintiff, for which compensation must be made." Sedgwick on Const. Law, 2d ed., p. 262-3.

"To hold that if the government refrains from the absolute conversion of said property to the use of the public, it can destroy its value entirely, can inflict irreparable injury and, because in the narrowest sense of the word, it is not taken, would pervert the constitutional provision." Ibid.

"To effectively impair the usefulness of property is a taking within the meaning of the constitution."

Pummelly vs. Green Bay Co., 80 U. S., 166,
167.

"To take away the essential use of property is to take the property itself, and to do this is beyond the power even of sovereignty, except by a proper proceeding to that end."

Cartin vs. Benson, 222 U. S., 78.

"Rights as regards real property, to light and air, *to be undisturbed by nuisance by the unreasonable use of neighboring property*, are rights wherever they exist, and to the extent to which they are secured by law, are part and parcel of the owner's property in land." Lewis on Eminent Domain, 2d Ed., Sec. 54, p. 56. "Whenever the lawful rights of an individual in the possession, use or enjoyment of his land are in any way abridged or destroyed by reason of the exercise of the power of eminent domain, his property is *pro tanto* taken and he is entitled to compensation." Ibid., Sec. 56, p. 58. "Thus if the city takes a lot adjacent to my own and under proper authority erects works thereon, the operation of which necessarily fills my premises with noxious gases whereby my land is depreciated in value, I am entitled to compensation." Ibid., p. 59. "*If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove in point of fact that the owner is deprived of property, though a particular piece of property may not be actually taken.*" Ibid., Sec. 57, p. 61. Sedgwick on Const. Law, 2d Ed., p. 462, 463.

"A partial destruction or diminution in value is a taking." Glover vs. Powell, 10 N. J. Eq., 211.

"Whenever the exercise of the right operates to destroy an easement incident to real property or amounts to an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, this is a taking of property. There need not be an exclusive appropriation of the property, but such an interference with the beneficial use thereof as operates an essential abridgement, of the owners rights incident to, and an essential part of the estate.

"There can be no question that the erection of gas works or the setting up of any other noxious trade in the vicinity of any premises that emit noxious odors, which are sent over my lands in quantity and volume sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life so as to constitute a legal nuisance, is a taking of my property as the Legislature may not permit without compensation. What possible distinction can there possibly be between the actual taking of my property, or a part of it and occupying it for the erection of a railroad track or a gas house and invading it by an agency that operates as an actual abridgement of its beneficial use and possibly a complete and practical ouster. There certainly can be none. By the erection of such works a burden is imposed upon my property, the property itself is actually invaded by an invisible, yet pernicious agency, that seriously impairs its use and enjoyment as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water; it is an incident to the land annexed to and part of it and is sacred as my right to the land itself. Therefore I apprehend that the Legislature has no power to shield one from liability for all the consequences of the exercise of an occupation that produces such results, any more than it has to authorize the flooding of my land or the permanent diversion of a stream." Wood on Nuisance, Sec. 762, p. 1093, and cases cited.

In Beach vs. S. I. Z. Co., 54 N. J. Eq., 65, (affd. 55 N. J. Eq., 824), the Court held that "Maintenance of a nuisance to real estate amounts to a taking of private property and cannot be legalized by

the Legislature even upon terms of compensation."

"Where the right of the claimant is clear, and the facts undisputed a Court of Equity is bound to give preventative relief. To refuse is to allow the defendant to take complainants property upon terms of paying such compensation from time to time as the jury may assess."

"It was suggested that in this case no injunction should be ordered, but that the complainants should be left to their action at law for damages. I am unable to adapt that view. It must be considered as settled law in this State that the maintenance of a nuisance of the kind here in question is, in effect, taking of property." (Penn. R. R. Co., vs. Angel, 14 Stew. Eq., 316-329.) Where Judge Dixon, speaking for the Court of Errors and Appeals, says:

"This principle rests upon the express terms of the Constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated or pollute the bleacher's stream so that his fabrics are stained, or fills one's dwelling with smells and noises so that it cannot be occupied in comfort, you equally take away the owner's property."

"In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion; this is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property."

The Court, page 476 Record states: "That if the

defendant's railroad was maintained and operated upon Sixth street that there would have been a taking of complainant's property without compensation and entitle it to an injunction against the operation of such road until such compensation had been ascertained and paid conformably to the doctrine of the N. Y. Elevated Railroad cases." But there can be no recovery if the railroad was on private property and not on a public street. This was not regarded to be the law by this Court in R. R. Co. vs. First Baptist Church, 108 U. S., 319, in which this Court in affirming a judgment for damages and held the defendant liable for damages *due to the operation* of its engine-house and repair shop, and upon its private property and not upon the public street, holding in terms "*that the action was not for consequential damages from the running of cars with reasonable care, but was a case of the use by the railroad company of its property in such an unreasonable way as to destroy and annoy the plaintiff in its occupation of its church to the extent of rendering it uncomfortable as a place of worship, and the Legislature authority exempts only from liability to suits, civil or criminal, at the instance of the States, and does not affect the claim of a private citizen for damages for the special inconvenience and discomfort as experienced by the public at large.*"

If the maintenance and operation of the defendant's railroad on Sixth street, would amount to a taking of private property without compensation, it is impossible for us to understand how the defendant can be exempt from such liability, by reason of the maintenance and operation of its road a few inches south of the south side of Sixth street and 58 feet south of complainant's property, and how the defendant can be liable in the one instance and not for the commission of precisely the same acts just outside of the line of Sixth street. The

courts have held "that a railroad company has no more right than an individual to so use its property as to unreasonably interfere with the peaceable and comfortable enjoyment by others of their property, and that defendant can no more escape making compensation for such damages than it can appropriate the complainant's church to its own use without making compensation therefore." (Chicago vs. Church, 103 Fed. Rep., 85, affd. 42 U. S. C. C., 178.)

"*The railroad company cannot be justified in an injury to private property any more than a private individual (Muhlker vs. R. R., 197; U. S., p. 544, 563), and its charter does not authorize dirt, cinders and smoke from two hundred passing trains a day to be poured into the upper windows of his house.*" The liability of the defendant for the annoyance and discomfort caused is the same as to those of individuals for a similar wrong" (Baltimore & P. R. R. Co. v. First Baptist Ch., 108 U. S., 317.)

If the acts of the defendant with their resulting effects, constitute a nuisance and a continuing trespass and a taking of private property without compensation, then it cannot make one particle of difference if defendant committed the acts while operating upon a public street or upon its private property immediately on the opposite side of a public street to plaintiff's property. At what particular locality the acts are committed which constitute a nuisance and a taking of private property without compensation, should not effect the question of liability to damages and an injunction. Whether on the private property of the railroad company or upon the public street should make no difference.

The tracks upon which the railroad is operated immediately opposite complainant's church and

school are a part of its freight yard and terminal and in the location of which the defendant acted in a private and not a public capacity, and "where a railroad company acquires property for terminal purposes in the heart of a city it cannot use such land in disregard of the comfort and property of others, but must adjust its operation so as to produce the least annoyance possible." Ridge vs. Pa. R. R. Co., 58 N. J. Law, 172.

"The defendant is using and proposes to continue "to use the lands immediately adjoining the com- "plainant's premises, and in which it has a right "of way for the purpose of a terminal yard, in such "a way and to such an extent as to seriously in- "terfere with the complainant's enjoyment of them "for religious exercises and worship. In this re- "spect the case is quite within the principle acted "upon in the Baptist Church cases, 108 U. S., 317; "137 U. S., 568. I think the complainant is en- "titled to an injunction." Methodist Episcopal Church vs. Pa. R. R. Co., 48 N. J. Eq., 455.

The Circuit Court in affirming the judgment further held that "there can be no recovery for annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad from its non-negligent and careful operation," and "that a defendant is liable only to those injured thereby, where such damages are the result of want of due care and skill in the conducting and operation of the railroad" (p. 470 Record), and

"That the decision of the New Jersey Supreme Court in the Beseman vs. Railroad, 50 N. J. L., holding that in the absence of clear proof of negligence cannot be maintained that when property has been incidentally injured to no matter what extent, that the property so injured was not taken in the constitutional sense" (p. 477 Record).

The Court in terms has held, following the Beseman case, that the complainant cannot recover for elements of damage and nuisance committed by defendant, even though they amount to a taking of private property without compensation, unless complainant has shown that the damages sustained are due entirely to negligent acts of the defendant, and private property may be taken without compensation in all cases, provided it is taken with the exercise of care and caution, and not through negligence.

If the acts of the defendant constitute a taking of private property without compensation, it seems to us unreasonable to hold that the defendant can continue to take private property without compensation so long as they do not do so negligently, and so long as they continue to exercise care the plaintiff is without relief. If they can take private property without compensation, provided they do not do so negligently, would be placing a construction upon the Federal Constitution which will be a novelty, to say the least. See 80 U. S., pages 166 and 167, and 222 U. S., 78.

"Taking cannot be limited to the absolute conversion of real property to the use of the public, so as not to include cases where the value is destroyed by irreparable and permanent injury inflicted on it." Pumpelly vs. Green Bay Co., 80 U. S., 13 Wall., 166 (20; 557); Foster vs. Stafford, 57 Vt., 128; Wilmes vs. Minneapolis, 2 N. W. R. Co., 29 Minn., 242; Mills Em. Dom., p. 119, 30.

"It includes not only the appropriation of the land, but also the direct consequences of such appropriation." Hamilton County vs. Garrett, 62 Tex., 602.

Where the acts of the defendant are such as appears by the undisputed facts in this case, it is entirely immaterial whether the result of those acts,

which amounts to a taking of private property without compensation, were committed by the defendant negligently or after the exercise of the utmost care and caution. The effect is the same in either event, and we claim that it was unnecessary to show negligence, but we have gone further in this case than from our understanding of the law we were required to do, and have distinctly and specifically proven by undisputed testimony that the acts of which we complain were due to gross carelessness and negligence in the operation of the road, and none of which facts were contradicted, disputed or denied by a single witness or one word of testimony offered by the defendant, and that this action so far as the entire defense shows, was upon the sole theory that although soft coal by careful firing could be burned without omitting black smoke, yet for such damages as the plaintiff sustained there can be no recovery for the reason that the defendant was a railroad corporation and which contention of defendant, is in fact the opinion of the Circuit Court of Appeals, as its operations were conducted on its private property and not upon a public street.

The Court in its opinion, p. 473 Record, stated that "it was referred to no decision of the Federal or State Courts in which the reasoning and conclusion of the Beseman case have been directly controverted," and "that the Beseman case may now be considered as the settled law for the State of New Jersey," p. 473, Record. The Beseman case is not the settled law of New Jersey, and the *Circuit Court of Appeals* was specifically referred to cases (Penn. Co. vs. Angel, and Pa. R. R. Co. vs. Thompson, and Church vs. Pa. R. R. Co.), directly controverting the Beseman case and decided by the same Judges who decided the Beseman case. By pages 22, 23 and 24 of the ap-

pellant's brief, filed with said Circuit Court of Appeals, the following appears:

It appears that this case (Beseman) has been twice examined by the Court of Errors and Appeals. It was first repudiated in the case of Penn. R. R. Co. vs. Thompson, 45 N. J. Eq., 870 (June, 1889), in which the Court held directly contrary to the ruling in the Beseman, holding that: "Where the acts of a railroad company, in drilling its cars, &c., amount to a legal nuisance to the owner and occupants of a dwelling house adjacent to the track complained of, it cannot defend and justify such acts on the ground of necessity and adverse user, if the particular track whereon such drilling is done has been laid less than twenty years, although its other and adjoining tracks have been laid and used more than twenty years. The complaint in this case is, that the defendant so manages the engines, cars and trains on its road, opposite the dwelling house of the complainant, in the City of Camden, as to create a nuisance to the complainant. The allegations in the bill are so similar to, and the testimony so nearly corresponds with the testimony in the case of Pa. R. R. Co. vs. Angel, 14 Stew. Eq., 316, that I shall be content with calling attention to that case. In that case the Court of Appeals decided that acts similar to the ones established in this case amounted to a nuisance. And so far the questions raised in this case are similar to the questions raised and decided in that, as I understand the counsel for the defendant, he does not expect me to disregard the law as laid down in that case. It is true that counsel called my attention to the case of Beseman vs. Penn. R. R. Co., 21 Vr., 235; and the counsel claims that the Supreme Court decide in favor of the company, and that the facts upon which the judgment was based were in all

respects similar to the facts in this case. But unless the questions now before me are quite distinguishable from the Angel case, I shall not be justified in departing from the rule there laid down."

This case (Penn. R. R. Co. vs. Thompson) was decided by the Court of Errors and Appeals, and which Court was unanimous in its decision and was composed of sixteen Judges, including Judges Beasley, Scudder, Dixon and Reed, the three identical Judges who had, sixteen months previously (Feb'y, 1888,), decided the Beseman case. And in which Thompson decision these three Judges concur with the other thirteen Judges of the Court in a unanimous decision.

From the foregoing it must appear that the Beseman case then and there ceased to be an authority; yet, if more be needed to satisfy this Court upon that point we will go a step further. The Beseman case again came up for criticism (May Term, 1891,) in the case of Methodist Church vs. Penn. R. R. Co., and in which the Court said:

"Complainant is the owner of a church edifice in which its congregation worships and conducts other religious exercises, situate on the south side of Bridge avenue, between Third and Fourth streets, in Camden, and it seeks by its bill to be protected against the same sort of injury at the hands of the defendant which was considered and dealt with in *Angel vs. Penn. R. R. Co.*, 14 Stew. Eq., 870.

* * * Counsel also relies upon *Beseman vs. Penn. R. R. Co.*, 21 Vr., 235, decided in the Supreme Court after the *Angel case* and before the *Thompson case*, and, after the *Thompson case*, affirmed on error, 23 Vr., 221. But the opinion of the Supreme Court in the *Beseman case* carefully distinguished it from the *Angel case*, and the opinion of Vice-Chancellor Bird, in *Thompson case*, acted on that distinction

and was adopted by the Court of Appeals with the assent of the Judges of the Supreme Court who took part in the Beseman case.

"It conclusively appears from these cases that the Court adopts the law as decided by the Court of Appeals and Errors, in Angel vs. Penn. R. R. Co., 41 N. J. Eq., 317, (14 Stew.), Mch., 1886, and which decision was also unanimous and in which the Judges deciding the Beseman case concurred, and which decision in the Angel case is directly opposed to that of the Beseman case, the Court saying in the Angel case that a railroad company using, for the purpose of a terminal yard, a portion of the street over which it has only a right of way, is responsible for any nuisance, public or private, thereby created, and an act of the Legislature cannot confer upon an individual or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their own property, except upon condition that just compensation be first made to the owners, and that a railroad company cannot justify the maintenance of a condition of things which directly renders a dwelling house in the neighborhood unfit for a place of residence, upon the ground that the nuisance necessarily results from the convenient transaction of the company's lawful business, and such a nuisance will be prohibited by injunction."

The Circuit Court of Appeals held "that there is no evidence constituting negligence on the part of the complainant as would enable the Court of equity to prevent its continuance" (p. 476, Record). We regret to differ with the learned Court that there is no evidence constituting negligence on the part of the complainant as would enable a Court of equity effectively to prevent its continuance. *There is no disputed fact as to the negligence of the de-*

fendant appearing in the record in this action. Not a single witness was produced and not one word of testimony offered by the defendant in contradiction or explanation of the existence or the effect of the various acts of nuisance, and such acts of the defendant, and their resulting effects are clearly and specifically proven and not contradicted or explained, and for this reason, if for no other, a suit of law as to the fact of the negligence of the defendant in the operation of its railroad became and is entirely unnecessary, and the complainant is entitled, by all the rules of law and justice, to a judgment upon the unanswerable conclusion of the uncontested, undisputed and incontestable facts.

"Where the rights of the claimant is clear, and the facts undisputed, a Court of equity is bound to give preventive relief. To refuse this is to allow the defendant to take complainant's property upon terms of paying such compensation, from time to time, as the jury may assess." Beach vs. S. I. Z. Co., 57 N. J. Eq., 65 Appl.; 55 N. J. Eq., 824, citing Angel & Pa. R. R. Co.

Evidence of Negligence.

That soft bituminous coal can be burned in locomotive engines without smoke is an established and undisputed fact as appears by the testimony of the defendant's witnesses as well as by the witnesses called by the complainant. And this being established it was unnecessary for the complainant as the Court in its opinion says, p. 476 Record, to show that the defendant was negligent in not using other fuel than bituminous coal. It appears from the evidence of Robinson, an engineer of thirty-three years' experience, that by throwing one shovelful of coal in the fire at one time and leaving the door open about one inch

ninety per cent. of the black smoke would be obviated, and that all of the black smoke in excess of ten per cent. is due to the carelessness of the fireman and nothing else, and that a fire can be started in an engine at the depot and there will be no necessity of putting in coal for a distance of a mile and a half, which would carry the engine and train to a point far beyond the church property. That the testimony of Robinson was in all respects true we call the attention of the Court to the instructions to firemen issued by defendant. (Def't's Ex. D 3, 4, 5 and 6), in which instructions it is said: "*Small quantities of coal at regular intervals will keep the fire bright and prevent smoke (fol. 10, p. 400, record) and to prevent smoke the fire door must be placed on or against the latch after firing coal*" (fol. 20, p. 400, Record).

The defendant's witness Garabrand also testified that to prevent smoke the firemen should throw one shovelful of coal upon the fire and leave the door open about four inches.

It appears from the evidence that there is practically no grade from the R. R. terminal extending for some distance beyond the church property. The grade testified to by the witnesses being but six-tenths of one per cent., about thirty feet to the mile. The defendant's witness Gibbs, testified that in going down grade, there should be no smoke at all emitted from the engine, and in going up grade there should be very little smoke if there was a very bright fire. The testimony of these witnesses establishes conclusively that the smoke from the engine upon the block opposite the church property is due to gross negligence.

It appears from the evidence of the priests connected with the church, the teachers connected with the school and many other witnesses, that many engines have stood for long periods of time on

the block opposite the church property, and during which time they were emitting dense volumes of black smoke, and on many of these occasions Father Kwiatkowski took a memorandum of the date, hour, and number of the engine, fol. 40, p. 136 to fol. 40; p. 137, and fol. 20, p. 223, Record. It appears from the evidence that police officer Boyle was detailed in connection with police officer Murphy, by the police department and the health department, to make an investigation and report to the city officials as to the extent of the smoke emitted by the Pa. R. R. Co., engines on 6th street, and that they started that instigation before this suit was commenced, and made the first investigation July 20th, 1910. The subpoena in this action was not served until July 29th, 1910, and the bill filed a day or two before. The investigation made by the officers extended over a period of nineteen days from July 20, 1910, to August 9th, 1910, during which time they found one hundred and seven different engines emitting heavy black smoke, and on each of these nineteen days the officers devoted not over an hour or two a day in their investigation; all of which is set forth specifically and in detail in the testimony of the officers as it appears in the record. If by careful firing black smoke will not be emitted from an engine as was testified to by the witnesses for the defendants as well as by the witness Robinson, for the plaintiff, then we say, that the conclusion is irresistible, that the emission of black smoke was as testified to by the officers, by the priests, by members of the congregation and by the teachers in school, as well as all damages sustained by the plaintiff therefrom, was due solely and exclusively to the gross negligence of the defendant, and this Court should not hesitate to grant to the plaintiff not only such an injunction as the facts warrant, but should compel the defend-

ant to pay to the plaintiff every dollar of damage that the most liberal construction placed on the plaintiff's evidence will justify, for the damages, injury and wrong to which the defendant has subjected the plaintiff, wilfully, negligently and outrageously for the past seven years. *Not one word of testimony was offered by the defendant in contradiction or in explanation of a single word appearing in the testimony in support of the plaintiff's case.* The entire testimony on the part of the plaintiff being to the effect, that although soft coal by careful firing could be burned without emitting black smoke, yet for such damages as the complainant has sustained by reason thereof, there can be no recovery, because the defendant is a railroad company, and the defendant defiantly continues the emission of black smoke from its engines in front of the church property, down to the present date, and insolently assert the right to continue the same in the future. What we have said as to smoke is also true of the noise due to the ringing of bells, blowing of whistles, the drilling of cars over the switches, and the blowing off of exhaust steam from engines standing in the freight yard and terminal, which it has extended in the last few years, up to and beyond the block where the church property is located, repeatedly compelling the teachers in the school to stop their exercises, and the priests to suspend services in the church.

The negligence and wilful disregard of the complainant's rights in the past year is further demonstrated by the testimony of defendant's witness, Garabrand, who testified "*that the emission of black smoke can be obviated by careful firing and 'vigilant supervision' of the firemen.*" That no such vigilance was exercised in the supervision of the firemen appears by the testimony of this witness as it appears, that in the year 1909 fifteen firemen were dis-

plined, whereas fifty-three were disciplined in 1910 and forty-seven so far this year. These figures are most significant if the Court will take notice that this action was not commenced until July 29, 1910.

The defendant introduced in evidence as a part of its defense Exhibit D 3, D 4, and D 6, pages 397 to 405 of the record.

The language in these exhibits is that of the defendant and should, under the rules of law, be construed most strongly against it.

It appears by this Exhibit D 6, instructions, July, 1890, page 404, Record:

"The bituminous coals contain a large amount of gas which is liberated by the heat. This gas, if not consumed, will appear at the stack, in the form of black smoke, but, if mixed with sufficient quantity of air at a high enough temperature, will burn and pass off as colorless vapor."

"If the large quantities of coal are charged at one time, it is impossible to admit enough air, under the required conditions for the perfect combustion of the large amount of gas generated, hence, the greatest economy of fuel and the discharge of the least smoke are only to be obtained by firing small quantities of coal at frequent intervals, in order that the amount of air passing into the firebox will be sufficient for the complete combustion of the gases."

"On the long firebox engines when working up to their full capacity, three shovelfuls of coal may be charged at a time without bad results; but at ordinary work and on the short firebox engines good results cannot be obtained if more than two shovelfulls are charged at a time. When doing exceptionally light work not more than one shovelful should be charged at one time."

"As far as practicable, the door should be run on the latch, and after coal is put in, left partially open until it can be closed without causing black smoke to appear at the stack."

"When the throttle is closed and the draft produced by the exhaust ceases, the amount of air passing through the fire box is proportionally reduced, and *unless precautions are taken to prevent it a large quantity of black smoke will be discharged; this, too, usually at a time when it is most objectionable;* for, when approaching stations, the doors of the car are often open and the smoke not having the force of the exhaust to carry it up in the air, falls down over the train and fills the cars. *In order to prevent this nuisance,* when approaching all regular shutting off places, firemen could stop firing long enough before shutting off to permit a good deal of the gas to be consumed. Before the throttle is closed the *door should be opened and blower put on and kept on until it can be closed without black smoke appearing at the stack.*"

"It has been proved that by carefully following these instructions, the amount of smoke will be reduced to such an extent that it ceases to be a serious source of annoyance and complaint. Firemen must, therefore, give this matter careful and earnest attention, without losing sight of the necessity of maintaining the steam pressure, and their success with firing with as little smoke as possible will be considered one of the first qualifications for their advancement."

The same language is used in Exhibit D 5, instructions of July 24, 1902, page 402.

The same language is again used in Exhibit D 4, instructions of June 1, 1908, as follows, page 400:

"Large quantities of coal placed in the fire box

at one time cool down the fire, cause smoke and waste coal; small quantities at regular intervals will keep the fire bright, prevent smoke and take less coal to keep up steam pressure."

"To prevent smoke and save coal, the fire door must be placed on or against the latch after firing coal or using the scraper, slash bar or hook, and when on sidings, in yards, at terminals or before starting."

"Before the throttle is closed, the blower must be used and the door placed on the latch. Firemen must stop firing long enough before steam is shut off to prevent smoke and waste or coal."

These instructions agree with the oral testimony of the defendants that by careful firing, *smoke in quantities to be objectionable can be prevented. Not reduced to a minimum, but absolutely prevented.*

"An action lies against the railroad company for negligently operating its locomotives in such manner as to cause them to emit smoke denser and more offensive in quantity and greater in volume than was reasonably required for the proper operation of the railroad to the injury of the plaintiff's property situated near the railroad."

Jenkins vs. Pa. R. R. Co., 67 N. J. L., 331.

It will be observed that the above action was for negligent operation of the railroad in allowing its engines "to emit smoke denser and more offensive in quantity than was reasonably required for the operation of its railroad."

What is true of smoke is also true of noise, and if the defendant should contend, which it doubtless will, that it has a right to emit such smoke, and make such noises as is reasonably necessary to the operation of its railroad (a proposition which we seriously deny) yet it has no right to emit more smoke or create more noise, as such excess and increase of smoke and noise being more than is actu-

ally necessary for the operation of its railroad would be a negligent operation, and without care in the running of its railroad, in so far as it affected the rights of and caused additional damage to the plaintiff by subjecting it to more smoke and noise than would reasonably be necessary in the operation of the railroad.

The Circuit Court further held that:

"In the absence of the determination in a suit at law as to the fact of negligence by the defendant in the operation of its railroad, a Court of Equity would be embarrassed in undertaking to adjourn the defendant against the issuing of more soot and cinders than was necessary to the careful and proper operation of its road, that such a decree would be futile and unenforceable," p. 31, Opinion. We desire particularly to call the attention of the Court to the *evidence of the defendant's witnesses*, referred to herein, supra, by which *it appears that it is not necessary to emit any soot and cinders in a careful and proper operation of its road*. Also that *no determination in a suit at law as to the fact of negligence was or is necessary, as the facts as to the nuisance and damage are undisputed and established by the uncontradicted testimony in the record*.

In Osborne vs. M. P. R. Co., 147 U. S., 248, the Court held: "*Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy, where the injury is destructive of, or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use under color of law but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable.*"

"There is no principle which will sustain a Court of Equity in refusing an injunction against the maintenance of an established continuing nuisance."

"ance and leaving the injured party to his remedy at law. To do so is in effect to permit a party to take his neighbor's property for his own, use it up on terms of making such compensation as a jury shall assess. This is inadmissible.

"A suit at law would not reach a wrong that occurs almost every hour of the day."

"A Court of Equity by a comprehensive decree can determine finally and once for all, the entire controversy between the parties, thus avoiding a multiplicity of suits and conserving the public interests."

"No remedy at law would be so complete or efficacious as is a suit in equity in such a case as this one.

"Where irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of compensation in damages, but it must be of such constant and frequent occurrence that no fair or reasonable redress can be had therefore in a Court of law." *Donivan v. Penn. Co.*, 199 U. S., 279-305.

"Whenever a nuisance becomes a special source of legal injury to an individual he may have an action of damages. Therefore and in cases of continuation equity will compel relief process of injunction." *Moses vs. U. S.*, 16 App., S. C., 423; 50 "L. A. A., 532."

Complainant is entitled to a judgment for damages, if not to an injunction.

The evidence as to \$11,552.71 structural damage to the complainant's property is uncontradicted and not disputed.

It appears from the testimony that the cost of renovation is as follows: Rambusch, for interior of Church, \$6,465; Jaroski, for interior of School, \$720; Jaroski, for interior of Rectory, \$900; which is for total \$11,131.00, all of which it is necessary to do by reason of the acts of the defendant. It further

appears from the testimony that Father Kwiatkowski was compelled to append \$391.71 to have the soot, cinders and ashes cleaned out of the organ pipes; adding this figure to the figure \$11,131.00 we have a total of \$11,552.71, and the complainant is entitled to that amount if not an injunction.

"Equity having acquired jurisdiction of a case will award all the relief which the nature of the case demands." Cyclopoedia of Law and Pro., Vol. 29, p. 1273.

1st. The want of care given by the Court to an examination of the record in this case is exemplified from the fact that the Court in its opinion at the bottom of page 2 states that it does not appear "how far from 6th or 7th street the lots upon which the school building is erected." While it distinctly appears in paragraph 5 of the complaint that the school building is 100 ft. on Sixth street and 100 Ft. on Brunswick street, "p. 2 of the record", and complainants Exhibit Deed C 19 "fol 40, p. 352, record," and the testimony of Father Kwiatkowski, "fol. 20, p. 115, record" states that the school is 100 ft. on Sixth street and 100 ft. on Brunswick street.

It is erroneously stated in the opinion of the Court that a four story building, 25 ft. in width neither owned by nor in the possession of the complainant intervenes between the church property and 6th street," while it distinctly appears from the testimony of Father Kwiatkowski "fol. 40, p. 114 and fol. 110, p. 115," that *this building does not intervene between the church property and Sixth street except for a distance of 45 ft., and that in the immediate rear of this building is a vacant piece of ground 25 ft. in width, and that three full windows of the church over 30 ft. in height and six or seven feet in width over look this vacant space and also a portion of another window also, and which windows*

are distant from the railroad 25 ft., the width of the corner lot, and 58 ft. the width of the street.

The question is of sufficient importance, not only to the 8,000 communicants and the 10,000 regular attendants in complainant's church, and to the 1,200 children, attendants in the complainant's school, but to the people generally throughout the country to justify an opinion from this Court directly upon the point, and for the further reason that this Court has on principle held the law to be directly the contrary in many instances, notably Mulker vs. R. R. and Church vs. Potomac R. R., 108 U. S., 317, in which latter case the Court held "that the liability of the defendant for annoyance and discomfort caused, is the same as that of an individual for a similar wrong, and if such be the law as announced by this Court, we fail to see how the railroad company is protected from the mere fact that it is a railroad company, and it can make no difference if the annoyance and discomfort was caused through negligence or after the exercise of due care and caution.

The affidavits (supra) of the two priests connected with the church and of the head teacher of the school show that the acts of which the complainant complain have been continuous from the date of the testimony given two years ago down to the present moment, and have been much aggravated since then, and to allow such acts amounting to a taking of private property without compensation to be continued for the next two years before this case can probably be reached and heard in its regular order, would entail a great deal of hardship upon the complainant, as it appears by the affidavits presented herewith that the church property is being seriously damaged day by day by reason of defendant's act, and which amount to a continuing nuisance and trespass. (See Affidavits post.)

For these reasons it is respectfully submitted that public interests as well as interests of the appellant will be subserved and much needless litigation prevented by an authoritative expression of the law, in the respect aforesaid at an early day, to which end the cause at bar should be advanced for argument out of its regular order, and set down for hearing on a certain day to be fixed by the Court.

For all of which relief the appellant respectfully prays.

Dated November 1st, 1913.

FRANK M. HARDENBROOK. **MARSHALL VAN WINKLE.**
 Atty. for Plff. and Appt. Counsel for Ptff. and Appt.
 15 Exchange Place, 1 Exchange Place,
 Jersey City, N. J. Jersey City, N. J.

IN THE SUPREME COURT OF THE UNITED STATES.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY CITY,,
Complainant and Appellant,

v.s.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant and Respondent.

UNITED STATES OF AMERICA, }
 DISTRICT OF NEW JERSEY, }
 COUNTY OF HUDSON, }

Sister Mary Hortulana, being duly sworn on her oath, deposes and says, that her testimony in this cause appears on pages 182-185 in the printed record herein, and in which testimony she specifically related the conditions which had existed in

the school of which she was head sister in charge for three years prior to the giving of said testimony.

That such testimony was given by her on July 31st, 1911, and that she continued as the head sister in charge of said school up to Sept. 1913, when she removed therefrom to the Mother Home at Lodi, New Jersey, and where she is now engaged.

That the conditions existing in the school from the operation of the Pennsylvania Railroad Company as specifically stated by her in her testimony, *continued without interruption from the date on which she gave said testimony down to Sept. 1913*, when she left said school as aforesaid, and that during said period and most every hour of the school hours, the noises of the engines, blowing off of exhaust steam, whistles, ringing of bells, was such that it interferred with the school exercises, and *that she had to suspend the lessons because of the noise, every day and sometimes several times a day.*

That the smoke from the engines many times a day came directly into the school room compelling the children to close their eyes and try to wave the smoke away with their handkerchiefs, and which smoke blackened the walls, Furniture, chart and maps in the school room, and which smoke carried with it particles of black soot which settled on the children's clothing and everything in the school room.

That during the period of the taking of the testimony in this case, deponent noticed that there was a decrease in the extent of the matters of annoyance stated in her said testimony, but almost immediately upon the conclusion of the taking of the testimony in this case, the elements of annoyance became very much worse both as to frequency, duration and extent, and so continued without interruption down to the time she left the said school as hereinbefore stated.

That complainant's Exhibit C, 6 to 11 are fair representations of the extent and color of the smoke emitted from the defendants engines, and it was a matter of hourly occurrence that two to four of defendants engines stood for periods of time varying from five minutes to half an hour immediately opposite complainant's school, emitting smoke and soot as shown in Exhibit C, 6 to 11.

SISTER MARY HORTULANA.

Subscribed and sworn to before }
me this 31st day of October, 1913. }

THOMAS F. FARRELL,
Notary Public of New Jersey.

IN THE SUPREME COURT OF THE UNITED
STATES.

ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA, JERSEY
CITY,

Complainant and Appellant,

vs.

No. 739.

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant and Respondent.

UNITED STATES OF AMERICA, }
DISTRICT OF NEW JERSEY, } ss.
COUNTY OF HUDSON,

ANTHONY KASPRZYCKI, being duly sworn on his oath, deposes and says, that since January, 1910, he has been and now is assistant parish priest to Father Kwiatkowski, at the church of the complainant above named.

That he concluded his testimony in this action on June 26th, 1911, and in which (pages 89 to 96 of the printed record) he testified in detail as to the annoyance in the church and the damage to the church property from smoke, soot, cinders and ashes, and as to the annoyance and interruption of the church services by the bells, whistles, exhaust steam and puffing of the defendant's engines.

That the conditions described by him in his said testimony have been a matter of daily and hourly occurrence from the date on which he concluded his said testimony, on June 26th, 1911, down to the date of this affidavit.

That complainant's exhibits C 6 to 11 are fair representations of the extent and color of the smoke emitted from defendant's engines since the conclusion of his said testimony, and it has been a matter of hourly occurrence since then; that from two to four of the defendant's engines have stood for periods of time varying from five minutes to half an hour immediately opposite the church and school continuously emitting smoke and soot as shown in Exhibits C 6 to 11, and that the church property is becoming monthly more and more damaged and depreciated in value.

And that since the close of the testimony in this case on October 19th, 1911, the matters of annoyance as described by him have become very much worse, as to frequency, duration and extent, and that he has once or twice each month since the close of his said testimony, down to the present time, been compelled to suspend church services until the noises ceased.

That it is one of his duties to attend the school of the complainant five days each week and remain from ten to half-past eleven o'clock each morning, and that since the giving of the said testimony on June 26th, 1911, he has almost daily seen the teach-

ers in charge of the school suspend the lessons while the noise from the defendant's engines continued.

That smoke from the engines many times a day came directly into the school room, compelling the children to close their eyes and try to wave the smoke away with their handkerchiefs; and which smoke blackened the walls, furniture, charts and maps in the school room, and which smoke carried with it particles of black soot, which settled on the children's clothing and everything in the room.

ANTHONY KASPRZYCKI.

Subscribed and sworn to before
me, this 31st day of October,
1913,

THOMAS F. FARRELL,
Notary Public of New Jersey.

IN THE SUPREME COURT OF THE UNITED STATES.

ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA, JERSEY
CITY,

Complainant and Appellant,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant and Respondent.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } ss.
COUNTY OF HUDSON,

BOLESLAW KWIATKOWSKI, being duly sworn on his oath, deposes and says, that since the year of

1895 he has been and now is the rector of the church of the complainant herein.

That he concluded his testimony in this action on September 8th, 1911, and in which (pages 114 to 157, and 222 to 236 of the printed record) he testified in detail as to the damage to the church property from smoke, soot, cinders and ashes, and as to the annoyance and interruption of the church services by the bells, whistles, exhaust steam and puffing of the defendant's engines, as during the time of his pastorate defendant built a stone embankment and established a switch yard opposite complainant's church, rectory and school.

That the conditions described by him in his said testimony have been a matter of daily and hourly occurrence from the date on which he concluded his said testimony on September 8th, 1911, down to and including this every morning.

That complainant's Exhibits C 6 to 11, are fair representations of the extent and color of the smoke emitted from defendant's engines since the conclusion of his said testimony and it has been a matter of hourly occurrence that from two to four of the defendant's engines have stood for periods of time varying from five minutes to half an hour immediately opposite complainant's church and school continuously emitting smoke and soot as shown in Exhibit C 6 to 11 and that the church property is becoming more and more damaged and depreciated in value.

And that since the close of the testimony in this case on October 19th, 1911, the matters of annoyance as described by him in said testimony have become very much worse, as to frequency, duration and extent, and that he has many times since the close of said testimony down to the present time,

been compelled to suspend church services on account of said noises.

BOLESLAW KWIATKOWSKI.

Subscribed and sworn to before me }
this 31st day of October, 1913. }

THOMAS F. FARRELL,
Notary Public, of New Jersey.

Please take notice, that the foregoing motion to advance the above entitled cause and to set the same down for argument upon a day certain to be fixed by Court, will be presented at the opening of the Court, at the Capitol, in the City of Washington, District of Columbia, on the ~~14~~ day of November, 1913, or as soon thereafter as counsel can be heard.

Dated November 1st, 1913.

FRANK M. HARDENBROOK. MARSHALL VAN WINKLE.
Atty. for Plff. and Appt. Counsel for Ptff. and Appt.
15 Exchange Place, 1 Exchange Place,
Jersey City, N. J. Jersey City, N. J.

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Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. ~~2~~ 269

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF
PADUA, JERSEY CITY,
Plaintiff and Appellant,

versus

PENNSYLVANIA RAILROAD COMPANY,
Defendant and Respondent.

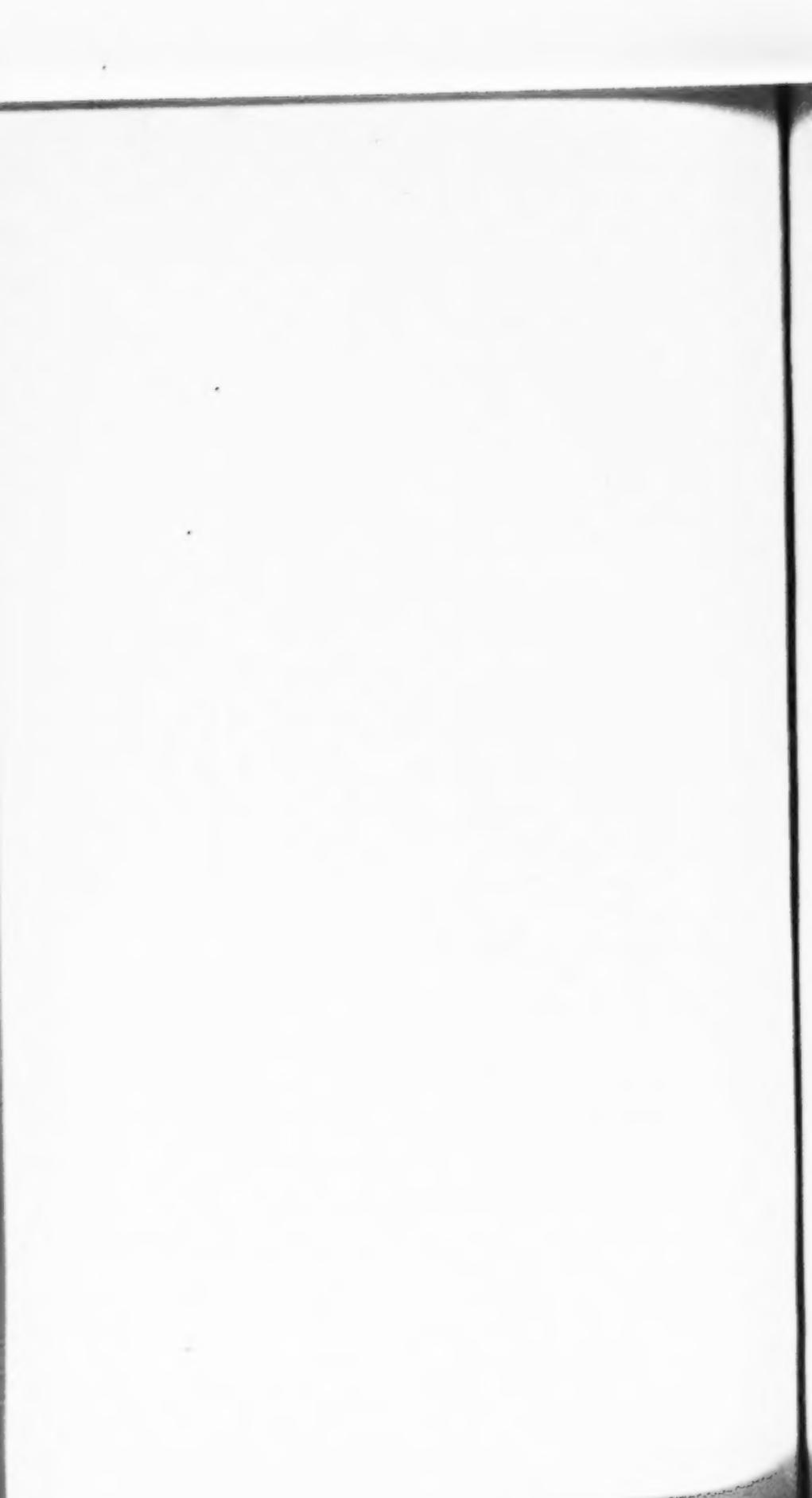
Appeal to the United States Supreme Court from the
Third Circuit.

MOTION TO DISMISS APPEAL AND BRIEF.

JAMES B. VREDENBURGH,
Attorney for Defendant and Respondent.

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Supreme Court of the United States.

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA, JERSEY
CITY,

Plaintiff and Appellant,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant and Respondent.

October Term,
1913.

No. 739.

And now comes the PENNSYLVANIA RAILROAD COMPANY, the respondent above named, by James B. Vredenburgh, its counsel, and moves to dismiss the appeal taken herein by the above named ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY CITY, upon the ground that this Court has no jurisdiction of the same, because the jurisdiction, in the above entitled cause, was dependent entirely upon the opposite parties to the suit being citizens of different States, and because the said appeal is otherwise informal, irregular and insufficient, apparent upon the face of the papers.

SUPREME COURT OF THE
THE UNITED STATES

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA, JERSEY
CITY,

Plaintiff and Appellant,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant and Respondent.

October Term,
1913,
No. 739.

SIRS:

PLEASE TAKE NOTICE that, upon the copy of the bill in equity and the answer and replication, in the Circuit (now District) Court of the United States for the District of New Jersey, in the suit above entitled; and upon a copy of the decree of said Court, upon said bill in equity; and upon a copy of the appeal to the Circuit Court of Appeals for the Third Circuit; and upon a copy of the opinion of the Circuit Court of Appeals for the Third Circuit; and upon a copy of the decree in the Circuit Court of Appeals, copies of which are hereto annexed; and upon a brief, a copy of which is herewith served upon you, we shall, on Monday, the first day of December, 1913, and if motions are not then heard, at the next succeeding motion day of this Court, make and submit at a stated term thereof, to be held in the Capitol in the City of Washington, District of Columbia, a motion, a copy of which is hereto annexed; and that we shall

also then and there move said Court for an order dismissing the appeal herein for want of jurisdiction and because the same is otherwise irregular, informal and insufficient, for the reason that the jurisdiction of said Court was dependent entirely upon the opposite parties to the suit being citizens of different States, and that therefore the said decree of the said Circuit Court of Appeals was final; and for other reasons which are apparent upon the face of said papers; and we shall then and there move for such other and further relief in the premises as may be just.

Dated Jersey City, November 6, 1913.

Yours, etc.,

JAMES B. VREDEBURGH,

of Counsel with

The Pennsylvania Railroad Company.

To

MARSHALL VAN WINKLE, Esq.,

Counsel, and

FRANK M. HARDENBROOK, Esq.,

Attorney for Plaintiff and Appellant.

THE CIRCUIT COURT OF THE UNITED
STATES, DISTRICT OF NEW JERSEY.

THE ROMAN CATHOLIC CHURCH OF
SAINT ANTHONY OF PADUA,

against

THE PENNSYLVANIA RAILROAD
COMPANY,

In Equity.

Bill of Complaint.

(*Filed July 27, 1910.*)

To the Honorable William M. Lanning, Judge of
the Circuit Court of the United States, Dis-
trict of New Jersey:

The Roman Catholic Church of Saint Anthony
of Padua of the city of Jersey City, Hudson
County, a religious corporation organized and
existing under the laws of the State of New Jer-
sey, and an inhabitant of the State of New Jersey,
bring this, its bill against The Pennsylvania Rail-
road Company, a corporation organized and exist-
ing under and by virtue of the laws of the State
of Pennsylvania, and having its principal office at
the city of Philadelphia, in the State of Pennsyl-
vania, and an inhabitant of the State of Pennsyl-
vania.

And your orator shows unto your Honor:

I. That your orator is a religious corporation
engaged in religious, educational and charitable
work since the year one thousand eight hundred
and eighty-four, upon the lands and premises
hereinafter described and owned by it.

II. That the defendant was duly incorporated

under the laws of the State of Pennsylvania on the thirteenth day of April, in the year eighteen hundred and forty-six, as a common carrier, with authority to lease, hold and operate a line of railway in the States of Pennsylvania and New Jersey, and as such at all the times hereinafter mentioned has maintained and operated and still maintains and operates a railroad, with its main and side tracks, locomotives, freight and passenger cars upon what is known as Sixth street, in the city of Jersey City, Hudson County, New Jersey.

III. That on the twentieth day of December, in the year eighteen hundred and eighty-four, your orator became, and from thence hitherto has been, and now is, the owner in fee simple absolute of those three certain lots in the city of Jersey City, County of Hudson, and State of New Jersey, which on a certain map of that part of the Town of Jersey, commonly called Aharsimus, made by Joseph F. Margin and filed in the clerk's office of the county of Bergen, A. D. eighteen hundred and four, are known and distinguished as lots numbered five, six and seven, in block numbered two hundred and fifty; said lots are also numbered five, six and seven in block numbered three hundred and ninety on Bacot's Map of Jersey City, made in eighteen hundred and sixty-one, and which is now on file in the office of the register of said County of Hudson. The said lots are each twenty-five feet wide in front and rear and one hundred feet in depth throughout, and front on the westerly side of Monmouth street, and immediately thereafter your orator caused to be erected thereon, at a large cost, a church edifice and since which time your orator has held continuously religious services therein.

IV. That on the tenth day of May, in the year eighteen hundred and ninety-three your orator became, and from thence hitherto has been, and now is, the owner in fee simple absolute of that certain lot of land in the city of Jersey City, Hudson county, New Jersey, and known and designated as lot nine, in block two hundred and fifty, now city block three hundred and ninety, being on the north side of Sixth street, one hundred feet west from the northwest corner of Sixth and Monmouth streets, twenty-five feet by one hundred feet; on Map of Town of Ahrasimus, made by Joseph Margin and filed in the office of the county of Bergen, eighteen hundred and four, and your orator caused to be erected thereon at a large cost a residence for the officiating priests attached to and connected with said church so erected by your orator, as aforesaid, and since which time said residence has been continuously occupied as a home by the said priests.

V. That on the eleventh day of June, in the year eighteen hundred and ninety-eight, your orator became, and from thence hitherto has been, and now is, the owner in fee simple absolute of those four certain lots of land in the city of Jersey City, Hudson county, New Jersey, and known and designated as lots seventeen, eighteen, nineteen and twenty, in block two hundred and fifty, on Map of the heirs of J. B. Coles and Bagot Map; running along Brunswick street one hundred feet; thence easterly parallel with Sixth street, one hundred feet; thence southerly one hundred feet; thence westerly one hundred feet, and immediately thereafter your orator caused to be erected thereon a parochial school for educational purposes, and since which time the said

school building has been continuously used as a school for upwards of eleven hundred children.

VI. That on the eighth day of August, in the year nineteen hundred and two, your orator became, and from thence hitherto has been, and now is, the owner in fee simple absolute of that certain lot of land on the northerly side of Sixth street, in the city of Jersey City, Hudson county, and State of New Jersey, and being twenty-five feet wide in front and rear by one hundred feet in depth and known and designated as lot ten, in block three hundred and ninety upon a map of Jersey City filed in the office of the register of the county of Hudson, in the year eighteen hundred and sixty-one, and known as the Bacot Map, and immediately thereafter your orator caused to be erected thereon an addition to the residence of the officiating priests connected with your orator's said church as set forth in paragraph IV of this bill.

VII. That on the twentieth day of March, in the year nineteen hundred and five, your orator became, and from thence hitherto has been, the owner in fee simple absolute of that certain lot of land on the southerly side of Seventh street, in the city of Jersey City, Hudson county, New Jersey, and being twenty-five feet in width in front and rear and one hundred feet in depth, and known and designated as lot thirty-one, in block two hundred and fifty, as the same appears on a certain map of lands of the heirs of J. B. Coles on file in the office of the register of Hudson county, New Jersey.

VIII. And that immediately after becoming the owner of the lands described in paragraph VII of this bill your orator caused to be erected

thereon at large expense a home and residence for the sisters and female teachers connected with the said church and school so erected by your orator, as aforesaid, and since which time said residence has been continuously used and occupied as a home by the said sisters and female teachers.

IX. And your orator further shows that the said buildings so erected by your orator are of substantial and costly construction and which are, except for the acts of the defendant, hereinafter complained of, convenient, pleasant and healthful, and only adapted and used for the respective purposes aforesaid, and that the immediate neighborhood of the same has long been, and now is, thickly populated and exclusively a residential district.

X. That the said defendant for upwards of the six years last past in the operation of its said railroad has maintained and operated upon said Sixth street, and immediately to the south of the said lands, premises and structures of your orator, a line of railroad track upon which it operates a great number of freight and passenger trains, cars, switch engines and locomotives, which continuously at all hours of the day and night pass upon said tracks the lands, premises and structures of your orator as aforesaid, each making its characteristic noises and which locomotives attached to said trains and engines connected therewith are now burning, and for upwards of the past six years have continuously burned, vast quantities of what is known as soft or bituminous coal, and from the burning and partial combustion of which there arises and continuously for upwards of the past six years has arisen from the smoke stacks connected with said locomotives and

engines large and dense volumes of black smoke, soot, cinders, carbon, ashes, particles of unconsumed coal, coal dust and noxious, unwholesome gases, offensive odors and vapors, which are carried to, over, into, upon and through the lands, premises and structures of your orator so owned, used and occupied by it as aforesaid, discoloring the glasses, thereby seriously interfering with light, and causing annoying and irritating flashes as the sun strikes the said smoke, soot and gases so in the air as aforesaid; injuring, damaging and destroying the carpets, curtains, furnishings, pictures and decorations contained therein; blackening, discoloring, damaging and destroying the roofs of said structures and the paint upon the inside and outside thereof, and clogging, corroding, perforating and damaging the leaders and gutters leading from said roofs and depriving your orator of the use of the outside of some of said structures for laundry purposes, thereby causing your orator great damage and expense, and which now are and at all times aforesaid have impregnated, contaminated and rendered impure, corrupt, offensive, unwholesome and unhealthful the air in and around the premises and structures of your said orator, depriving it and the congregation and members of said church, and the visitors thereto and the priests connected therewith, as well as the scholars, pupils and teachers connected with and attending said school of the use and comfortable enjoyment of the same to which they are legally entitled, injuring, damaging and destroying their clothing, and the said premises and structures of your orator have been, and are now being, seriously injured and rendered uncomfortable and less desirable for

church, school or residence purposes and the health, comfort and rest of said priests, pupils, teachers and members of said church seriously impaired, threatened and injured and the reasonable use of the same interfered with and impaired, to the damage of your orator in the sum of fifty thousand dollars.

XI. That the said acts of the defendant have taken from your orator property consisting of the easement of light and air to which your orator is legally entitled, and deprives it of the same without due process of the law, and without just compensation, or any compensation whatever, and that such acts of the defendant in such interference with and appropriation of said property of your orator has been, and now is, a violation of the provisions of the Constitution of the United States.

XII. That the aforesaid acts, use, occupation of and appropriation by the defendant as aforesaid constitute and are a nuisance to and one of special injury to your orator, and are unnecessary, avoidable and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad, and which acts are continuous, and which will cause great and irreparable loss to your orator and subject your orator to the prosecution of a multiplicity of suits for damages unless the defendant be restrained by injunction from the commission thereof.

XIII. All of which acts and doings of the said defendant are contrary to equity and good conscience, and tend to the manifest injury and oppression of your orator in the premises.

In Consideration Whereof and for as much as your orator is remediless in the premises at and

by the strict rules of the common law can only have relief in a court of equity where matters of this nature are properly cognizable and relievable.

To the end therefore your orator prays that the said defendant may deem to pay to your orator the sum of fifty thousand dollars damages as your orator has suffered by reason of the premises, and that your Honor grant unto your orator a writ of injunction commanding the said defendant, its agents, servants and employees to absolutely desist and refrain from so operating its said railroad, locomotives and engines as to cause or permit black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives to fall upon or enter into the premises and structures of your said orator in such appreciable quantities as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the same by your orator and the priests connected therewith and persons using the said respective structures of your orator; and that a writ of subpoena issue against the defendant, The Pennsylvania Railroad Company, requiring it to appear in this Court and answer this bill of complaint, but without oath, all answer under oath being expressly waived, and to stand by such orders and decrees as the court may from time to time adjudge and enter in the premises, and that your orator have such other and further relief as to the court may seem proper and as may be necessary to fully protect and enforce the right and equities of your orator.

GEORGE J. McEWAN,
Solicitor for Complainant and of Counsel.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

BOLESLAW KWIATHKOWSKI, being duly sworn on his oath says that he is the Pastor and Secretary of the Roman Catholic Church of Saint Anthony of Padua, the foregoing complainant; that the matters and things therein set forth, so far as they relate to the acts and deeds of the said complainant are true, and so far as they relate to the acts and deeds of any other person or persons, corporation or corporations, he believes them to be true.

BOLESLAW KWIATHKOWSKI,
Pastor.

Sworn and subscribed to before me this 26th day of July, A. D. 1910.

FRANK M. HARDENBROOK,
Master in Chancery of New Jersey.

CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF NEW JERSEY.

<p>THE ROMAN CATHOLIC CHURCH OF SAINT ANTHONY OF PADUA, <i>Complainant,</i></p> <p><i>vs.</i></p> <p>THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant.</i></p>	<p>In Equity</p>
---	------------------

Answer.

(Filed May 23, 1911.)

The answer of THE PENNSYLVANIA RAILROAD COMPANY, the above named defendants to the bill of complaint exhibited against them by the above named complainant.

These defendants now, and at all times hereafter, saving and reserving to themselves all and all manner of benefits and advantages of exception which may be had or taken to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as these defendants are advised that it is material or necessary for them to make answer unto, answering, say:

1. These defendants, answering paragraphs one, three, four, five, six, seven, eight and nine of said bill of complaint, say: That they do not know and cannot set forth as their belief or otherwise, whether the statements of facts set forth in said paragraphs of said bill of complaint are true; but that they have no reason to doubt that

the complainant is, and, since eighteen hundred and eighty-four, has been, engaged in religious and educational work upon a portion of the land described in the bill of complaint, and has erected thereon buildings of a substantial construction.

2. These defendants, answering paragraph two of the bill of complaint, say: They admit the statement as to the incorporation of these defendants as a common carrier; and their authority to lease, hold and operate a line of railroad in the States of Pennsylvania and New Jersey. But they deny that they as such, or in any other capacity, and at all the times or at any of the times mentioned in the bill of complaint, or at any other time, have maintained or operated, or that they still maintain and operate a railroad with its main or side tracks, locomotives, freight and passenger cars, upon what is known as Sixth Street in Jersey City, Hudson County, New Jersey.

3. These defendants, answering paragraphs ten, eleven and twelve of the said bill of complaint, say: That they deny the truth of the statements set forth in said paragraphs, and of each and every one of said statements; and they say that they never have maintained or operated, and do not now maintain or operate any railroad upon Sixth Street, in Jersey City, and that they have not for upwards of six years last past, in the operation of their railroad, maintained or operated upon said Sixth Street a line of railroad tracks, or any railroad tracks, or any freight or passenger trains or cars or switch engines or locomotives of any kind or character.

These defendants say that, under their charter rights and in the execution of their powers, and by force and virtue of the several acts herein-after mentioned, they did survey, lay out and

locate their railroad on the several courses set down in such survey, and did construct a railroad between the points in the said Acts set forth; and that after the construction of said elevated railroad, these defendants, in order to carry into effect the objects of the incorporation of the united companies hereinafter mentioned, did use the said railroad so constructed on its surveyed route, in the prosecution of their said business as a common carrier of passengers and freight, and continued the same during the times mentioned in the said declaration, and a long time prior thereto, as hereinafter mentioned, as they lawfully might do, for the causes aforesaid; and did necessarily operate thereon a great number of freight and passenger trains, switch engines and locomotives, and did thereby necessarily create some smell and some noise, and did necessarily shift and distribute their cars, and did necessarily blow the whistles of their locomotives, and did necessarily start and stop with trains of cars and back them and start them again, and that each did necessarily make its characteristic noises; and did necessarily cause noise, smoke and vibrations, as they lawfully might do for the causes aforesaid.

4. These defendants, further answering, say: That the Legislature of the State of New Jersey, by an act entitled "An Act to incorporate the New Jersey Railroad and Transportation Company," passed March 7th, 1832 (P. L. page 96), created the New Jersey Railroad and Transportation Company, a body politic and corporate, to exercise all the powers and privileges pertaining to corporate bodies and necessary for the purposes of said Act; and with all the rights and powers necessary to the construction of a railroad with as many sets of tracks as they may deem neces-

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sary, from a point in the City of New Brunswick to a point on the Hudson River, opposite the City of New York, and to take possession of any land needed for the site of the said road, and to acquire the same by purchase or condemnation in fee simple, with power, when said railroad was constructed, to charge tolls and rates for the passage of all carriages upon said railroad, and to make regulations for the collection and levying of the same; and to regulate the time and manner for transporting goods and passengers and for collecting tolls on the said railroad; and also to use thereon engines and carriages of their own for the transportation of persons or any species of property; but, at the end of thirty years, the State might take the said railroad at an appraised value.

That, immediately after the passage of the said act, the said New Jersey Railroad and Transportation Company surveyed and filed the route of their railroad from the City of New Brunswick to Jersey City, opposite the City of New York, and acquired the land and constructed a railroad thereon, in accordance with the terms of the above-mentioned Act; and, in the month of September, eighteen hundred and thirty-four, opened said railroad as a public highway for the transportation of property and persons between the said termini, and have since maintained and operated said railroad up to the time of the execution of the lease hereinafter mentioned.

5. These defendants, further answering, say: That the State of New Jersey, by an act entitled, "An Act to enable the United Railroad and Canal Companies to increase their depot and terminal facilities at Jersey City," approved March 30th, 1868 (P. L. page 551), empowered the said New Jersey Railroad and Transportation Company,

and the United Delaware & Raritan Canal Company, and the Camden & Amboy Railroad and Transportation Company to acquire from the State the land under water in Harsimus Cove in Jersey City, lying between high water mark on the west, the deep water of the Hudson River on the east, the center of South Second Street on the north, and the center of South Seventh Street on the south, in the name of the New Jersey Railroad and Transportation Company, and to fill up and improve the same, and erect wharves, piers, store-houses and other buildings and sheds and car and engine houses and appendages, and to build a branch railroad not exceeding one hundred feet in width, from said property so purchased as aforesaid, to some point in the present line of the New Jersey Railroad, eastward of the deep cut in Bergen Hill, with as many separate tracks and rails as the directors shall deem necessary; with power to procure the right of way for such branch railroad, either by purchase or by appraisement, in the manner prescribed by the original charter, and to make such branch railroad elevated so as to pass over the streets of said city, at least twelve feet in the clear above said streets, in consideration of a sum of money to be paid by said companies to the State of New Jersey, the amount of which was to be ascertained by the Attorney General and three commissioners to be appointed by the Supreme Court.

That subsequently the Attorney General and said three commissioners did ascertain that the amount which the said companies should pay to the State of New Jersey for the land and powers granted by the said last mentioned Act, was the sum of five hundred thousand dollars; and thereupon the said the New Jersey Railroad and Transportation Company and the other companies paid

to the State of New Jersey the said sum of five hundred thousand dollars, and thereafter made a survey of said branch line and filed the route thereof in accordance with law, and, at great expense, acquired from the owners thereof, for the purposes of such branch railroad, as provided by said act, a route one hundred feet wide, from a point on the New Jersey Railroad in the deep cut in Bergen Hill, to said lands in Harsimus Cove, and constructed and built on said route an elevated branch railroad; and thereafter erected on the said lands in Harsimus Cove a terminal yard in connection with said branch railroad, with wharves, sheds, and a grain elevator, warehouses and tracks,—all at great expense; and these defendants commenced to operate the said branch railroad and said terminal yard on or about the first day of May, eighteen hundred and seventy-two, which work was done and expenditure made with the full knowledge of, and without objection from the owners of all the lands set forth in the said bill of complaint.

6. And these defendants, further answering, say: That on or about the thirtieth day of June, eighteen hundred and seventy-one, the Delaware and Raritan Canal Company, the Camden & Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company, (commonly called the United Railroad and Canal Companies), by indenture bearing date that day, did grant, demise and to farm let unto The Pennsylvania Railroad Company the above named defendant, all their railroads and appurtenances and real and personal property, including the said Harsimus Cove property and the said branch line leading thereto, for the full term of nine hundred and ninety-nine years, unless sooner terminated by default in the payment of the rent or taxes.

That by an act entitled "An act to validate and confirm a certain lease and contract between the companies now known as the United New Jersey Railroad and Canal Company, and the Pennsylvania Railroad Company, the said lease was validated, ratified and confirmed; which act was approved March 27th, 1873 (Laws, page 1298).

That these defendants have been in possession of the property of the New Jersey Railroad and Transportation Company and of the United New Jersey Railroad and Canal Company, including the said land at Harsimus Cove and the said branch line from Harsimus Cove to the main line in the Bergen cut, under said lease, as lessee thereof, since the year eighteen hundred and seventy-one, and are now in such possession under said lease, and have been during all that time and still are using and operating the same for the transportation of goods and passengers in and across the State of New Jersey, from the city of Philadelphia to the city of New York. That the transportation of goods over the said branch line, since said lease, has been very large and has required the constant use of the same.

7. And these defendants, further answering, say: That the New Jersey Railroad and Transportation Company acquired the land for said route to Harismus Cove, as filed in the office of the Secretary of State, prior to the year eighteen hundred and seventy-three, in accordance with the terms of their said charter; that some of the persons from whom they acquired said land were at that time also the owners of the lands set forth in the bill of complaint, and that said owners granted to the New Jersey Railroad and Transportation Company the lands in the said route, for use by them and by these defendants as a railroad company in operating and maintaining a railroad

thereon in the way and in the manner in which said railroad is now maintained and operated; and that prior to the year eighteen hundred and seventy-three these defendants operated said railroad on said route as filed in the office of the Secretary of State, as said railroad is now operated, and they have, ever since the year eighteen hundred and seventy-three, in the same way and manner, maintained and operated said railroad over said land within said route; and that, from the year eighteen hundred and seventy-three, up to the present time, these defendants have, by force of the franchises of the New Jersey Railroad and Transportation Company above mentioned, derived from the above-mentioned public grants, maintained and operated their railroad and run their trans., carrying merchandise and freight within said route, doing no more damage to the lands adjacent to said route than that which necessarily results from the transaction of such acts and business.

8. And these defendants, further answering, say: That by an act entitled "An act concerning public utilities, to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21st, 1911, it was, among other things, enacted that the Board provided for by said act should have general supervision and regulation of, and jurisdiction and control of all public utilities, and also over their property, property rights, equipments, facilities and franchises, so far as might be necessary for the purpose of carrying out the provisions of said act, and should, among other things, have power to investigate, upon its own initiative, or upon complaint in writing, any matter concerning any public utility as herein defined, and that the public utility as defined by said act included every corporation which

operated or maintained or controlled within the State of New Jersey any steam railroad.

9. And these defendants, aver, in addition to the foregoing answer, that they have, for over thirty years, and since the said legislative grant, had actual possession of the lands in said route, uninterruptedly, and have uninterruptedly continued to operate their trains, cars, switch engines and locomotives over the said railroad on said route in the same way and manner as they now maintain and operate the same; and aver that they have acquired, both by statute and by prescription, the right so to do; and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

10. These defendants deny that they have in anywise infringed upon the rights of the complainant as alleged in the said bill of complaint, or otherwise, and deny that the complainant is entitled to any relief whatever, or to any part of the relief in said bill of complaint demanded; and allege that the complainant has no standing in this Court or in any court of equity.

And these defendants pray in all things the same benefit and advantage of this their answer, as if they had pleaded to said bill of complaint.

And these defendants deny all and all manner of unlawful acts whatsoever, whereof they are in anywise by the said bill of complaint charged.

All which matters and things these defendants are ready and willing to prove, as this Honorable Court shall direct; and pray to be hence discharged with their reasonable costs and charges in this behalf most wrongfully sustained.

THE PENNSYLVANIA RAILROAD
COMPANY,

by VREDENBURGH, WALL & CAREY,
their Solicitors and Counsel.

CIRCUIT COURT OF THE UNITED STATES,
DISTRICT OF NEW JERSEY.

<p>THE ROMAN CATHOLIC CHURCH OF SAINT ANTHONY OF PADUA, <i>Complainant,</i></p> <p><i>vs.</i></p> <p>THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant.</i></p>	<p>In Equity</p>
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Replication.

(Filed June 3, 1911.)

This repliant saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto, saith, that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replication; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver maintain and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

GEORGE J. McEWAN,
Solicitor and of Counsel with Complainant.

DISTRICT COURT OF THE UNITED
STATES, DISTRICT OF NEW JERSEY.

<p>THE ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, <i>Plaintiff,</i></p> <p><i>v/s.</i></p> <p>THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant,</i></p>	<p>No. On Bill. In Equity</p>
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FINAL DECREE.

(Filed February 15, 1913.)

At the September Term of the District Court of the United States for the District of New Jersey, in the Third Circuit, held at the United States Court Room in the City of Trenton on the 15th day of February in the year of our Lord One thousand nine hundred and thirteen:

Present—HON. JOHN REILLY, District Judge.

This cause came on to be heard at the April Term of the Circuit Court in the year of our Lord one thousand nine hundred and twelve, and was argued by counsel and was continued for advisement until the present term; and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the defendant has not maintained or operated upon Sixth Street in the City of Jersey City a line of railroad tracks.

That the defendant, operating its road under

legislative authority, has not taken, and does not take from the complainant any property to which the complainant is legally entitled.

That the acts of the defendant in the operation of its railroad have not constituted, and do not constitute a nuisance and are not so unnecessary, avoidable and unreasonable as to warrant the issuing of an injunction restraining it from the use of soft or bituminous coal in the operation by the defendant of this railroad.

And it is ordered, adjudged and decreed that the bill of complaint be dismissed and that the defendant be hence discharged with its reasonable costs and charges.

JOHN RELLSTAB,
Judge.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY.

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA, JERSEY
CITY,

Complainant and Appellant,

against

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant and Appellee.

APPEAL AND ALLOWANCE.

(Filed February 24, 1913.)

The above named complainant, the Roman Catholic Church of St. Anthony of Padua, Jersey City, feeling itself aggrieved by the decree made and entered in this cause of February 15th, 1913, and filed in the office of the Clerk of this Court dismissing the bill of complaint herein with costs; does hereby appeal from said decree to the Circuit Court of Appeals of the United States for the third judicial circuit for the reasons specified in the assignment of errors filed herewith and it prays that this appeal may be allowed and that a citation issue as provided by law; and that a transcript of the record and proceedings, evidence and papers upon which said decree was based duly authenticated may be sent to the Circuit Court of Appeals of the United States for the Third Circuit and that the said decree of said District Court may be reversed and such decree made as to said Circuit Court of Appeals shall seem meet and proper.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

FRANK M. HABDENBROOK,
Attorney for Plaintiff and Appellant,
The Roman Catholic Church of St.
Anthony of Padua, No. 15 Exchange
Place, Jersey City, N. J.

Jersey City, N. J., Feb. 21st, 1913.

And now to wit on February 24, 1913, it is ordered that the appeal be allowed as prayed for.

JOHN RELLSTAB,
District Judge.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

March Term, 1913.

No. 1734 (List No. 47.)

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA, JERSEY
CITY,
Appellant,
vs.
THE PENNSYLVANIA RAILROAD
COMPANY,
Appellee.

And afterwards, to wit, on the fourth day of April, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument surpleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-fifth day of August, 1913, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

March Term, 1913. No. 1734.

ROMAN CATHOLIC CHURCH OF ST.
ANTHONY OF PADUA,
Appellant,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,
Appellee.

**APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT
OF NEW JERSEY.**

Before GRAY, BUFFINGTON and McPHERSON,
Circuit Judges.

GRAY, Circuit Judge:

This is an appeal from a decree of the court below, dismissing a bill in equity, asking for an injunction and an award of damages. The bill of complaint alleges that complainant is a religious corporation and has been active as such since 1884, upon the lands and premises described in the bill.

That the defendant was incorporated in 1846 as a common carrier, with authority to lease, hold, and operate a line of railway in the States of Pennsylvania and New Jersey,

“and as such, at all times hereinafter mentioned, has maintained and operated, and still

maintains and operates a railroad, with its main and side tracks, locomotives, freight and passenger cars, upon what is known as Sixth Street, in Jersey City, Hudson County, New Jersey."

That on the 20th day of September, 1884, the complainant became the owner of three lots in Jersey City, County of Hudson, and State of New Jersey, fronting on the westerly side of Monmouth Street. (No map of the premises having been presented on either side, we assume that Monmouth Street runs at right angles to Sixth Street, and that the lots in question are situate in a block bounded on the south by Sixth Street, on the east by Monmouth Street, on the north by Seventh Street, and on the west by Brunswick Street.) How far these lots were from Sixth Street, nowhere appears. That immediately thereafter, it caused to be erected thereon, at a large cost, a church edifice, since which time it has held continuously religious services therein.

That on the 10th day of May, 1893, complainant became the owner of a lot of land in the said city of Jersey City, situate on the north side of Sixth Street, 100 feet west from the northwest corner of Sixth and Monmouth Streets, and in the same block as the aforementioned lot. That complainant caused to be erected there, at a large cost, a residence for the officiating priests attached to and connected with said church, since which time, the same has been continuously occupied as a home by said priests.

That on June 11, 1898, complainant became the owner of four certain lots of land in said city, and in the same block as the lots above referred to,

fronting on Brunswick Street 100 feet, but how far from Sixth or Seventh Street does not appear. That immediately thereafter, complainant caused to be erected thereon a parochial school for educational purposes, since which time the same has been continuously used as a school for upwards of 1100 children.

That on August 8, 1902, complainant became the owner of a lot of land on the northerly side of Sixth Street, in said city, in the same block as the lots aforementioned. That immediately thereafter, it caused to be erected thereon an addition to the residence of the officiating priests connected with complainant's said church.

That on March 20, 1905, complainant became in like manner the owner of a lot of land on the southerly side of Seventh Street, in the said city, in the same block as the aforementioned lots, and that immediately thereafter it caused to be erected thereon at large expense, a home and residence for the sisters and female teachers connected with said church and school; since which time, it has been continuously so used and occupied.

That the buildings so erected are of substantial and costly construction, and, except for the acts of the defendant complained of, convenient, pleasant and healthful, and adapted and used for the respective purposes aforesaid; and that the immediate neighborhood has long been and now is thickly populated and exclusively a residential one.

That the said defendant, for upwards of six years last past, in the operation of its said railroad, has maintained and operated *upon said Sixth Street*, and immediately to the south of said lands and premises and structures of complainant, a line

of railroad track, upon which it operates a great number of freight and passenger trains, cars, switches, engines and locomotives, which continuously, at all hours of the day and night, pass upon said tracks, each making its characteristic noises which locomotives attached to said trains, are now burning, and for upwards of the past six years have continuously burned, vast quantities of what is known as soft or bituminous coal, and from the burning and partial combustion of which there arises, and continuously for upwards of the past six years there has arisen, large and dense volumes of black smoke, soot, cinders, carbon, ashes, particles of unconsumed coal, coal dust and noxious, unwholesome gases, offensive odors and vapors, which are carried to, over, into, upon and through the lands, premises and structures of complainant so owned, used and occupied by it as aforesaid; by reason of which, the buildings of said complainant are seriously injured and their use, for the purposes aforesaid, seriously interfered with, to the great inconvenience and discomfort of those occupying said buildings and worshiping in said church.

The bill then charges that the said acts of the defendant have taken from the complainant property, consisting of the easement of light and air, and deprives it of the same without the process of law and without just compensation, or any compensation, whatever,

"and that such acts of the defendant in such interference with and appropriation of said property of your orator, has been and now is a violation of the provisions of the Constitution of the United States."

The bill then avers that the aforesaid acts, use, occupation of and appropriation by the defendant, as aforesaid, constitute and are a nuisance and of special injury to the complainant,

"and are unnecessary, avoidable and unreasonable, and not necessarily connected with the construction or a reasonable operation of said railroad, and which acts are continuous and will cause great and irreparable loss to your orator and subject your orator to the prosecution of a multiplicity of suits for damages, unless the defendant be restrained by injunction from the commission thereof."

The bill then concludes with the averment that the complainant is remediless in the premises, under and by the strict rules of the common law, and can only have relief in a court of equity. The bill therefore prays that defendant may be deemed to pay to complainant the sum of \$50,000—damages suffered by it, by reason of the premises, and that there be granted to complainant

"a writ of injunction, commanding the said defendant, its agents, servants and employes, to absolutely desist and refrain from so operating its said railroad locomotives and engines as to cause or permit black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives, to fall upon or enter into the premises and structures of your said orator, in such appreciable quantity as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the same by your orator, and the

priests connected therewith and persons using the said respective structures of your orator."

The bill then concludes with a prayer for a subpoena and answer by the defendant, without oath.

The answer of the defendant denies that it had ever maintained or operated a railroad *on Sixth Street* in Jersey City.

It alleges that, as lessee, it has maintained and operated, since 1871, an elevated railroad, with five tracks, on the duly authorized right of way of the United New Jersey Railroad and Canal Company, on land between Fifth and Sixth Streets, but not *on any part of Sixth Street*.

The defendant, further answering, avers that the Legislature of the State of New Jersey, by an act entitled "An Act to Incorporate the New Jersey Railroad and Transportation Company," passed March 7, 1832, created a body politic and corporate, to exercise all the powers and privileges pertaining to corporate bodies and necessary for the purposes of said act with all the rights and powers necessary to the construction of a railroad, with as many sets of tracks as they may deem necessary, from a point in the city of New Brunswick to a point in the Hudson River, opposite the city of New York, and to take possession of lands needed for the site of the said road, and to acquire the same by purchase or condemnation, in fee simple, and to charge and collect tolls, &c.

That immediately after the passage of said act, the said New Jersey Railroad and Transportation Company surveyed and filed the route of their railroad from the city of New Brunswick to Jersey City, opposite the city of New York, and acquired the land and constructed a railroad thereon, in accordance with the terms of the act, and in Sep-

tember, 1834, opened sail railroad as a public highway for the transportation of property and persons, and maintained and operated said railroad up to the time of the execution of the lease thereafter mentioned.

That the State of New Jersey, by an act entitled "An Act to Enable the United Railroad and Canal Companies to Increase Their Depot and Terminal Facilities at Jersey City," approved March 30, 1868, empowered the said New Jersey Railroad and Transportation Company, and the United Delaware and Raritan Canal Company, and the Camden and Amboy Railroad and Transportation Company, to acquire from the State the land under water in Harsimus Cove, in Jersey City, lying between tide water mark on the west, the deep water of the Hudson River on the east, the centre of South Second Street on the north, and the centre of South Seventh Street on the south, in the name of the New Jersey Railroad and Transportation Company, and to fill up and improve the same, by erecting wharves, piers, car and engine houses, and other buildings, and to build a branch railroad, not exceeding 100 feet in width, from said property, so purchased as aforesaid, to some point in the present line of the New Jersey Railroad, eastward of the deep cut in Berkin Hill, with as many separate tracks and rails as shall be deemed necessary. With power to procure the right of way for such branch railroad, either by purchase or by condemnation, in the manner prescribed by the original charter, and to construct the same as an elevated railroad, so as to pass over the streets of said city at least 12 feet in the clear above the same, in consideration of a sum of money to be paid out by said companies to the State of New Jersey, the amount of which was to be ascertained

by the Attorney General and three commissioners to be appointed by the Supreme Court. Subsequently, and agreeably to such an ascertainment, the New Jersey Railroad and Transportation Company and the other companies paid to the State of New Jersey the sum of \$500,000, and thereafter made a survey of its said branch line and filed the route thereof in accordance with law, and at great expense acquired from the owners thereof, for the purpose of such branch railroad, as provided by said act, a route 100 feet wide from a point in the New Jersey Railroad, in the deep cut in Bergen Hill, to said lands in Harsimus Cove, and constructed and built on said route the elevated branch road authorized by the act; that thereafter, the companies erected on the said lands in Harsimus Cove a terminal yard in connection with said branch railroad, with wharves, sheds, and a grain elevator, warehouses and tracks, all at great expense. That the defendant commenced to operate the said branch railroad and said terminal yard on or about the first day of May, 1872, with the full knowledge of and without objection from the owners of any of the lands set forth in the bill of complaint.

That on or about the 30th day of June, 1871, the Delaware and Raritan Canal Company, the Camden and Amboy Railroad and Transportation Company, and the New Jersey Railroad and Transportation Company (commonly called the United Railroad and Canal Companies), by indenture bearing date that day, did grant and demise unto the Pennsylvania Railroad Company, the defendant, all their railroads and appurtenances, and real and personal property, including the said Harsimus Cove property and the said branch line leading thereto, for the full term of 999 years.

The said lease was validated and confirmed between the companies and the Pennsylvania Railroad Company, by an act of the Legislature of the State of New Jersey, approved March 27, 1873.

That defendant has been in possession of the property so leased, including the said land at Harsimus Cove and the said branch line from Harsimus Cove to the main line from the Bergen Cut, as lessee thereof, since the year 1871, and is now in such possession under said lease, and has been during all that time and still is using and operating the same for the transportation of goods and passengers in and across the State of New Jersey, from the city of Philadelphia to the city of New York.

That the land for the said route to Harsimus Cove was acquired by the New Jersey Railroad and Transportation Company, prior to the year 1873, in accordance with the terms of their said charter, and that some of the persons from whom they acquired said land were at that time also the owners of the lands set forth in the bill of complaint, and that the said lands were granted to the said New Jersey Railroad and Transportation Company by said owners for use in operating and maintaining a railroad thereon, in the way and in the manner in which said railroad is now maintained and operated and that from the year 1873 up until the present time, the defendant has, by force of the franchises above mentioned, derived from the above mentioned public grants, maintained and operated its railroad and run its trains along said route, doing no more damage to the lands adjacent to said route than that which incidentally and necessarily results from the transaction of such acts and business.

The answer also avers that the defendant has, for over 30 years, and since the said legislative grant, had actual possession of the lands on said route uninterruptedly, and has uninterruptedly continued to operate their trains, cars, switch engines and locomotives over the said railroad on said route, in the same way and manner as they now maintain and operate the same, and that there has been acquired, both by statute and prescription, the right there so to do.

And defendant finally denies that it has in any wise infringed upon the rights of the complainant, as alleged in the said bill of complaint.

These allegations of the answer, for the most part, especially those in regard to the legislative history and operation of the railroad during the period since 1871, are not denied, and from the answer and evidence, we may also take, as undisputed, the following facts:

In 1887, an embankment 100 feet wide, with stone retaining walls on each side, was substituted for the trestle. The top of this embankment is generally 18 feet above the level of Sixth Street. The whole of the embankment is to the south of Sixth Street, and of the tracks on the embankment, no portion of the same, or of the embankment, is located on that or any other street, but entirely on the land or right of way of the defendant company.

There has been no change in the number of tracks on this embankment since 1887.

From 1873 to 1905, the use of these tracks in transportation increased, but since 1905, has remained stationary.

The locomotives by which the trains are moved have always burned bituminous coal, from the burning of which characteristic smoke arose from

the smoke stacks, and the cinders and dust forming this smoke were carried from this right of way to the adjacent land in different directions and different distances, depending upon the force and direction of the wind. The church of complainant fronts on Monmouth Street, not on Sixth Street. A four-story brick building, 25 feet in width, neither owned by or in possession of the complainant, intervenes between the church property and Sixth Street. All other property within an equal distance from the railroad, must be similarly affected by the operation of the same.

It is also admitted that, owing to the nearness of this portion of the branch road to the freight terminal at Harsimus Cove, the road having been built to connect the said Harsimus Cove with the main line at Bergen Cut, the tracks on the south side of Sixth Street, between Monmouth and Brunswick Streets, are much occupied by shifting engines and in the making up of trains, incident to terminal operations.

It is admitted that no portion of the railroad is on Sixth Street, as alleged in the bill of complaint, but is situated on a strip of land 100 feet wide, south of Sixth Street and running parallel therewith, and we shall consider the bill as if amended in that important respect.

The charge of the complainant, as set forth in its bill, is two-fold:

(1) That the acts of the defendant have taken from the complainant its property, consisting of the easement of light and air to which it is legally entitled, and deprives it of the same without due process of law and without just compensation, or any compensation whatever, in violation of the Constitution of the United States.

(2) That the aforesaid acts, use, occupation of and appropriation by the defendant, as aforesaid, constitute and are a nuisance of special injury to complainant, and are unnecessary, avoidable, and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad.

The latter paragraph seems to suggest, although it does not charge, negligent management by the defendant of its locomotives, and that the injury complained of was the result of such negligence. On page 66 of his brief, counsel for complainant says: "While this action is not based upon any allegation of negligence, yet the acts of nuisance of which the plaintiff complains are due to negligence." On page 70 of his brief, complainant's counsel makes the following statement: "The allegations of the plaintiff's bill, that the acts of the defendant are unreasonable and unnecessary, do not charge that they are negligently done, as they may have been committed after the exercise of all the care and caution possible."

On this ground, he distinguishes the present case from the case of Bunting vs. Pennsylvania Railroad Co., saying that that was an action based entirely upon negligence, which, being alleged, it became the duty of the plaintiff to establish, and in failing to do this, the plaintiff did not make out a case. So also on this ground, the present case is distinguished, by counsel for the complainant, from Jenkins vs. Pennsylvania R. R. Co., 67 N. J. L. 331, in which the action at law was brought against the defendant company for *negligently* operating its locomotives in such manner as to cause them to emit smoke denser and greater in volume than was reasonably required for the proper operation of the railroad.

These positions of the complainant are somewhat confusing, as a number of pages of its brief are devoted to showing that the defendant was guilty of negligence in its use of bituminous coal, and in so firing its engines as to produce more smoke than was necessary for the proper operation of the road.

But the gravamen of complainant's argument rests on two propositions:

First, that the emission of smoke from the engines of the defendant, while operating its road on its own land, parallel with Sixth Street and in the block between Brunswick and Monmouth Streets, in such quantities as to enter into and upon complainant's premises, constituted of itself an actionable nuisance and a taking and appropriation of the complainant's property, to wit, its easement of light and air, without due process of law and without compensation, in violation of the Constitution of the United States and of the State of New Jersey in that behalf.

Second, that the complainant is entitled to an award of damages and to an injunction inhibiting such conditions, without regard to whether the smoke, gases and noises were occasioned by any negligence on the part of the defendant, or resulted after the exercise of all care and caution possible on its part.

The defendant relies upon the fact that it is a *quasi* public corporation, and as such has been authorized by the Legislature in its charter to locate its railroad as a highway for the transportation of passengers and commodities between the two definite points, Harsimus Cove and Bergen Cut, and that as a public corporation, it has been clothed with the right of eminent domain, without

which, such a necessary improvement as a turnpike road or a railroad could not be constructed for the accommodation and convenience of the public.

It is not denied that the railroad of the defendant, as here complained of, was lawfully located, as authorized by the Legislature of New Jersey and for the public purposes stated in its charter. To fulfill these public purposes, it was authorized, among other things, to use steam for the propulsion of its engine and the movement of its trains. Steam, of course, cannot be created except by the combustion of fuel, and the combustion of fuel inevitably produces more or less smoke. These usual and normal results of the operation of a railroad, like the noises created by the movement of its trains, are necessarily contemplated and taken into account by the Legislature that authorizes its construction. They enter into the common experience of modern life and are recognized as necessary accompaniments of the convenience and advantages which a railroad transportation brings to the public. Their sufferance is one of the penalties of living in a large community like a city. The annoyance and inconvenience occasioned thereby are to be viewed from the same legal standpoint as are the annoyance and inconvenience necessarily suffered by those who live along a turnpike or other highway. Some dust and noise arising from the traffic along such highways, are the necessary and unavoidable incidents of the authorized and lawful use thereof. The same may be said of the noise of street cars. It is an undoubted annoyance to the people living along their route. To many people, it is a serious annoyance, often interfering with sleep and quiet home

life. As said by Judge McPherson in the case of *Bunting vs. Pennsylvania R. R. (supra)*, the perfectly proper use of these vehicles constitutes an annoyance, from which people suffer and sometimes seriously, but this inconvenience is an injury for which there is no redress.

It may be stated, therefore, as a principle well established by reason and authority, that the consequential, incidental and unavoidable annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad, from its non-negligent and careful operation, does not constitute an actionable nuisance. It is also equally well established that, where such damages are the result of the want of due care and skill in the conduct and operation of the railroad, the defendant company is liable to those injured thereby.

The correctness of these propositions seems to be recognized by the complainant, as the stress of its argument, as we have pointed out, is not placed upon any contention that the damage complained of was caused by the negligent operation of its railroad by the defendant, but, that the coming of the smoke and cinders upon the complainant's premises, without regard to whether such coming was the result of negligence of the defendant in the operation of its road, or was consistent with the utmost care and skill in such operation, was a taking of complainant's property without due process of law or just compensation, and was within the constitutional inhibition in that regard.

This point is urged with much plausibility of argument by counsel for complainant, and the cases cited in its support require careful consideration.

There must be something peculiar and excep-

tional in the situation, to warrant the contention that the normal result of the careful operation of a railroad authorized by law, is the taking of private property for public use, within the inhibition of the Constitution. A careful examination of the cases cited and quoted from in the brief of the counsel for the complainant, justifies this assumption. We refer now to a few of those which seem to be most relied upon, and the opinions in which are most largely quoted from in complainant's brief.

The first of these,—Chicago G. W. Ry. Co. vs. First M. E. Church, 102 Fed. Rep. 85, was a case in which the defendant company, by virtue of the right granted by the municipality to operate and maintain a railroad on a public street, claimed the right to erect a water hydrant in the middle of said street, for the use of its locomotives, opposite the center of the church building of the plaintiff and 35 feet distant therefrom, and a depot or station on the opposite side of the street, 60 feet distant from said church. The gravamen of the complaint, as stated by the court, was that, by reason of the location of said depot and the erection of said water tank, the engines of the defendant company were constantly going backwards and forwards in front of the church, on Sundays and other days, for the use of said water hydrant, and by the noise, smoke, cinders, etc., interfered with and impaired the easement of the complainant as an abutting owner on said street. In reference to these facts, the Court of Appeals for the Eighth Circuit said:

“Whatever the fact may be, no complaint is made in the petition in this case, on account of the mere movement of trains over the defend-

ant's tracks in the street. It is the consequences flowing from the use of the street and its track for other purposes than merely moving its trains, that is complained of. . . . Granting, therefore, that the defendant had a right to run its trains over the track in Choctaw Street, and that it was not liable for any damages unavoidably resulting therefrom, this concession falls far short of supporting the defense in this action. It did more than run its trains over its tracks. It erected a station, at which its passenger trains stopped, and a water hydrant in the middle of the street, under the very windows of the church, at which all its trains, freight and passenger, stopped to take water. . . . It was not competent for the city to make a grant to the railroad company, which would exempt it from liability to the abutting owner from maintaining such a private nuisance. But the city made no such grant, either expressly or by implication. The rule, that no one will be heard to complain of the proper exercise of a lawful authority, cannot be invoked to shield the defendant in this case. The railroad company had no authority to erect its water hydrant where it did. . . . Conceding that the noise, vibrations and inconveniences and annoyances which are unavoidable in the lawful running of trains over a railroad track, and which are common to the whole public and to all the abutting owners of property on the street, are not actionable injuries, the plaintiff's right of action is not affected thereby."

The language quoted by counsel in his brief, from this opinion, refers to this unlawful occupation of the street in front of complainant's property, which, together with the noises, smoke, etc., incident thereto constituted a nuisance and invasion of the easement of the complainant upon said street, as an abutting owner thereon.

The acts complained of were not necessary to the authorized operation of defendant's road. It is in this respect not unlike the leading case of *B. & P. Ry. Vo. vs. Fifth Baptist Church*, 108 U. S. 317, cited by the complainant and recently considered by this court in the case of *Bunting vs. Penna. R. R. Co.* The hydrant and station, the sources of the injury complained of, were not necessary to the operation of the road. Like the repair shop in the Fifth Baptist Church case, they concerned the rights and conduct of the defendant in its private capacity, and they could have been located in some other convenient place, where the annoyance therefrom would not have constituted either a private or public nuisance.

So, in the well considered case of *Muhlker vs. Harlem Railroad Company*, 197 U. S. 544, cited by complainant. Plaintiff sued to enjoin the use of a certain elevated railroad structure on Park Avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access, and other rights appurtenant to property abutting on said public street. It appears that, in pursuance of legislative authority prior to the erection of the elevated railroad complained of, the road ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by walls three feet high. Pursuant to an act of the Legisla-

ture of the State of New York, of 1892, there was constructed along said Park Avenue, in front of plaintiff's premises, a new permanent elevated railroad structure of iron and steel, about 59 feet wide, with four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue. It was contended by the defendant company that this was a mere change of its railroad from the surface to the elevated structure, and within the general powers granted to it by the Legislature. The court held, however, that the new structure was a new taking of private property rights, to wit, the easement of light and air of an abutting owner on the street, above the surface thereof, Mr. Justice Day saying in the course of his opinion on behalf of the court:

"It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it, as an essential and inviolable part, easements of light and air, as well as of access."

The abutting owner, subject to the rights of the public in the street, as a highway, had a well recognized property right in the easement of light and air and access in and to such street. This property right was clearly invaded, if not destroyed, by the change made by defendant from a surface or sunken road to the permanent physical structure of the elevated road complained of, and by the smoke and other annoyances incident to the operation thereof. But it will be observed that the smoke annoyance was only considered as part of and incident to the unlawful taking, by the permanent structure, and part of the consequences of

an unlawful act, and there is no intimation that it would have been considered by itself an actionable nuisance, or unlawful taking, as incident merely to the surface or sunken road.

The importance, if not the paramount authority, of the New Jersey decisions in this regard must not be overlooked, and it is recognized by counsel for the complainant, who relies strongly for the support of his contention upon the supposed authority of Penna. R. R. Co. vs. Angell, 41 N. J. Eq. 316. The facts, as disclosed in the opinion of the court in that case, are that the complainants were owners and occupants of a dwelling house, on the southerly side of Bridge Street, between Second and Third Streets, in the city of Camden. The defendant's tracks ran through the central part of Bridge Avenue, in front of complainant's dwelling, cross Second Street, into its terminal yard, which extends from the westerly side of Second Street to the Delaware River. The bill averred that the defendant used its tracks in front of complainant's house, for the purpose of distributing cars and making up trains in its freight and passenger business, and that it kept locomotives and cars laden with livestock standing there, so that by reason of the stenches, noises, smoke, steam and dirt thereby occasioned, the comfort of complainant's home was seriously impaired. And an injunction was prayed for.

The defendant's justification was rested upon the ground that the Legislature and the Common Council of Camden had authorized the defendant to use Bridge Avenue for its business; that its business required such use as the defendant had hitherto made, and therefore the use could not be, in a legal sense, injurious. The court said:

"There are two sufficient answers to this claim.

"The first is, that neither the Legislature nor the Common Council has attempted to grant so extensive a privilege as is here set up. The charter of the Camden and Amboy Railroad Company (the lessor of the defendant), passed in 1830, authorized it to construct and operate a railroad, with all necessary appendages, within limits embracing the locality now under consideration. In 1834, the Camden Common Council, by resolution, authorized that company to use Bridge Avenue for the purpose of its roadway. . . . In 1862, the City Council, by 'an ordinance to afford facilities to the Camden and Amboy Railroad Company for the running of their trains through the city of Camden,' gave its consent and authority to the company to lay side-tracks, running obliquely from a point on the railroad along Bridge Avenue, between Second and Third Streets, to and upon the company's depot property lying west of Second Street. From these laws and regulations arise whatever rights the defendant, which is the lessee of the Camden and Amboy Railroad Company, appears to have in Bridge Avenue, in front of complainant's house. In our judgment, they indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not for the purposes of a station yard. The primary privilege given is that of passage; this and its reasonable incidents cover the whole scope of the grant. . . . But when, in the ordinary course of its business, the company devotes a

portion of its roadway to station purposes, it goes beyond express legislative sanction, and can support itself, if at all, only as a private individual might. This is what the defendant did in Bridge Avenue. Having a right of passage there, it used its tracks as though they were within its terminal yard, and so used them constantly in its every day concerns. For this, there is no legislative or municipal authority.

"But, secondly, an act of the Legislature cannot confer upon a private corporation, acting primarily for their own profit although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners."

Of course, this language must be taken in connection with the facts of this case, as discussed in the previous part of the opinion. It had just been decided that neither the Legislature nor the Common Council, by authorizing the defendant to build its road on Bridge Avenue, had authorized it to create a terminal yard or station on that avenue, and that the location and building of such yard and station must be taken to be done in the private individual capacity of the defendant, and therefore not incident to the public purposes for which a passageway for its tracks was granted along Bridge Avenue. It was therefore in the second place properly and logically argued that neither the Legislature nor the Common Council of Camden *could* authorize the use of the street for these private purposes of the corporation, as distinguished from its public purposes, to the detriment of the owners and occu-

pants of dwellings abutting on said avenue, without making compensation therefor. This is the doctrine in *B. & P. Ry. Co. vs. Fifth Baptist Church*, viz., that in the location and erection of a repair shop, the company was acting in its private capacity, and it was not necessary for its public purposes that such shop should be erected on the particular site chosen. The opinion concludes:

"It must not be gathered from these propositions that all those inconveniences, which are the necessary concomitants of the location of railroads in populous neighborhoods, are to be considered civil injuries. That railways shall be so constructed and operated is required by the unanimous consent of the community, and the annoyances thence unavoidably arising are not of sufficient importance to be regarded as invasions of those rights of property which society recognizes and protects. They must be classed rather among those limitations which the social state imposes upon the enjoyment of private property for the common good."

We cannot, however, agree with the closing sentence of this paragraph, quoted by complainant's counsel, if it means, as argued by him (which we do not assume that it does) that the liability of the defendant can be made to depend upon the degree of the annoyance caused by the operation of the road, without regard to whether that operation be conducted negligently or with the utmost skill and care. If, by the exercise of due care, such annoyances are avoidable, of course the defendant company should be held liable therefor. What we have said, however, as to the facts and

opinion in this case are sufficient to show that its *ratio decidendi* does not touch the issues in the case now before us.

This judgment of the Court of Errors and Appeals was made in 1886. In 1888, the Supreme Court of New Jersey delivered its opinion, by Chief Justice Beasley, in the case of Beseman vs. Penna. R. R. Co., 50 N. J. L. 235.

The suit was for damages alleged to have been done to the houses and lands of the plaintiff, by the running of defendant's trains. The defendant was the same as the defendant in the present case, and the part of the road on which it is alleged the injuries complained of originated, is the same as that involved in the present suit, to wit, that part of the road between Harsimus Cove and Bergen Cut which runs on an elevated structure south of Sixth Street and parallel therewith.

The declaration, in substance, alleged that the plaintiff was the owner of certain lots of land in Jersey City, fronting on Fifth Street, on each of which lots there were dwelling houses on the front and rear, and that the defendant, on the first of January, 1874, built an elevated track for a railroad (the same which is now complained of), running at the rear of said lots and very near, to wit, within ten feet, to the rear of the dwelling houses situated on the rear of said lots, and has so used said elevated track for the passage of locomotives and cars in the transportation of cattle, sheep, swine, &c., as to render said dwelling houses of said plaintiff unfit for habitation, and of no use or value to said plaintiff whatever, and that said defendant, during all the time aforesaid, both on the day named and at all hours of the night time, has wrongfully allowed its cars, so loaded, emit-

ting noisome and unhealthy odors, to stand upon said track within close proximity, to wit, the distance of ten feet, to the dwelling houses on the rear of said lots, and has then and there shifted and distributed its cars and blown the whistle of its locomotives, and started its trains of cars, and suddenly stopped and backed them, and started them again, causing great and unusual noises in the neighborhood of said dwelling houses, and causing divers noxious, offensive and unwholesome vapors, fumes, smoke, smells and stenches to flow, arise and surround said dwelling houses, and thereby also jarring the doors and walls of said dwellings and breaking plaster upon the walls, and by means aforesaid has driven the tenants from said houses and has rendered the same untenantable and unfit for use, etc.

The first plea was the general issue. The second was a special traverse, in which the defendant set out its chartered right to build this elevated road between Fifth and Sixth Streets, in Jersey City, and parallel therewith; that after its construction, the defendant, in order to carry into effect the objects of the incorporation, used the same in the prosecution of its business as a common carrier of passengers and freight, during the time mentioned in the declaration, as it lawfully might do, by reason of the authority aforesaid, and that the noises arising from the passage, shifting and distribution of its cars and blowing of the whistles of its locomotives, and the smoke from its engines, complained of by the plaintiff, were necessarily created in the careful and skillful operation of its road, and were the supposed grievances of which the plaintiff in her declaration complained; "without this," &c.

On the demurrer to this plea, Beasley, chief justice, speaking for the court, said among other things:

"Its" (defendant's) "position is that, for such incidental and unavoidable damage it is not responsible. The plaintiff occupies the opposite ground, claiming that with respect to private property, a railroad is, *per se*, a nuisance whenever it throws a detriment such as would be actionable at common law on such property.

"That this proposition, on which the plaintiff's case rests, is a most momentous one, is at once apparent. If it should be sustained, an illimitable field of litigation would be opened. If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to the plaintiff's property, so it must be as to all other property in its vicinity. It is not only those who are greatly damaged by the illegal act of another, to whom the law gives redress, but its vindication extends to every person who is damaged at all—unless, indeed, the loss sustained be so small as to be unnoticeable by force of the maxim, '*De minimis non curat lex.*' The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide spreading, impairing in a sensible degree some of the usual conditions upon which depend the full enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested. Such a doc-

trine would make these companies, touching land owners, general tort feasors; their tracks run for miles through cities of the state, and every land owner on each side of the track would be entitled to his action; and so in the less populated districts, each proprietor of lands adjacent to the road would have a similar right, and thus the litigants would be numbered by the thousands. It is questionable whether the running of railroads would be practicable if subjected to such a responsibility."

The whole of this opinion must be read, to appreciate the clearness of its reasoning and the broad statesmanship, as well as the judicial acumen of its conclusions. In the course of his opinion, the chief justice refers to the case of Pennsylvania Railroad Co. vs. Angell (*supra*), and the B. & P. Ry. Co. vs. Fifth Baptist Church (*supra*), upon both of which counsel for the plaintiff relies.

"Neither of these decisions," he says, "is in point, and the principles of law declared in the latter is (*sic*) directly adverse to the proposition laid as the basis of this suit. The former of these precedents presented to the court the naked proposition, whether the railroad company, the defendant in the proceeding, should be restrained from doing certain acts which were obviously *ultra vires*. . . .

"The decision of the Supreme Court of the United States, just referred to, rested on the same basis. A railroad company located its repair shop and engine house next to a church, to which it was a nuisance, by reason

of the noises occasioned by the business carried on at the place. The court declared that the company could not justify the maintenance of such a nuisance. The propriety of this result seems unquestionable. The railroad company, in selecting a place for repair shops, acted altogether in its private capacity. Such location was a matter of indifference to the public and consequently, with respect to such an act, the corporation stood on the footing of an individual and was entitled to no superior immunities. But in this same case, Mr. Justice Field, in his opinion, is careful to emphasize the difference in legal results between those damages which are the necessary product of the running of a railroad and those which are not of that character, for he says: 'Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care, is *damnum obsque injuria*. The private inconvenience in such case must be suffered for the public accommodation.' "

The opinion in the Beseman case then disposes of the constitutional question, as to the taking of private property without compensation, on the reasoning hereinbefore indicated. We have dwelt

upon this case as such length, because of the importance and authority it has attained as a leading case in the jurisprudence of this country. We have been referred to no decision of the federal or state courts, in which its reasoning and conclusions have been directly controverted. This judgment of the Supreme Court of New Jersey was afterwards unanimously affirmed by the Court of Errors and Appeals, for the reasons given by the Supreme Court (52 N. J. L. 221).

Many cases in other states have been cited by counsel for the defendant, in which Beseman vs. Penna. R. R. Co. is approvingly referred to. The principle established has also been affirmed by so many decisions in the courts of New Jersey, that it may now be considered as the settled law of that state, as shown in the following list of cases cited by counsel for the defendant:

Church of Holy Communion vs. Paterson Extension R. R. Co., 46 N. J. Eq. 376; Simmons vs. Paterson, 60 N. J. Eq. 385; M. E. Church vs. Penna. R. R., 48 N. J. Eq. 455; Stockton vs. Central R. R. Co., 50 N. J. Eq. 72; Hayes vs. Waverly & Passaic R. R. Co., 51 N. J. Eq. 350; Ridge vs. Penna. R. R. Co., 58 N. J. Eq. 176; Marcus Sayre Co. vs. Newark, 60 N. J. Eq. 362; Thompson vs. Penna. R. R. Co., 51 N. J. L. 43; Costigan vs. Penna. R. R. Co., 54 N. J. L. 236-7; Roebling vs. Trenton Ry., 58 N. J. L. 674;

Church of the Holy Cross vs. Paterson
R. R., 68 N. J. L. 410;
Jenkins vs. Penna. R. R. Co., 67 N. J. L.
332.

In some of these cases, it is expressly pointed out that the judgment in Beseman vs. R. R. in nowise conflicts with that in Penna. R. R. vs. Angell, which fact is apparent from the examination already made of the two cases. It would unduly extend this opinion to discuss the numerous decisions cited by counsel on either side, in their respective briefs. Many of them distinctly support the position here taken, and none of them seriously controvert or oppose it.

We have carefully examined the so-called "New York Elevated Railroad Cases," referred to and relied upon by complainant, to wit:

Lahr vs. Met. El. Ry. Co., 104 N. Y. 268;
Story vs. Same, 90 N. Y. 122;
Bohm et al. vs. Same, 129 N. Y. 576;
Sperb vs. Same, 137 N. Y. 155.

We have already indicated the grounds upon which they should be distinguished from the present case, in our examination of the decision of the Supreme Court, in Chicago G. W. Ry. Co. vs. First M. E. Church (*supra*), as also in what has been said as to the principle involved in the decision of the Supreme Court in Balt. & P. Ry. Co. vs. Fifth Baptist Church (*supra*).

It only remains to again note, in regard to these cases, that the decisions therein proceeded upon the ground so clearly stated in one of them (Story vs. N. Y. El. R. R. Co., *supra*), by Danforth, J., speaking for the Court of Errors and Appeals.

After stating the relative rights of the public and abutting owners in the street in question, he says:

"It is conceded to be a public street. But besides the right of passage, which the grantee, as one of the public, acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. The official survey—its filing in a public office—the conveyance by deed referring to that survey and containing a covenant for the construction of the street and its maintenance, make as to him and the lot purchased a dedication of it to the use for which it was constructed. The value of the lot was enhanced thereby, and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such. For that purpose, no special or express grant was necessary; the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves sufficient. (Wyman vs. Mayor of N. Y., 11 Wend. 487; Trustees of Watertown vs. Cowen, 4 Paige, 510.) The right thus secured was an incorporeal hereditament; it became at once appurtenant to the lot, and formed 'an integral part of the estate' in it. It follows the estate and constitutes a perpetual incumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient tenement. (Child vs. Chappell, 9 N. Y. 246; Hills vs.

Miller, 3 Paige, 256; Trustees of Watertown vs. Cowen, 4 Id. 514.)

"Nor does it matter that the acts constituting such dedication are those of a municipality. The state, even, under similar circumstances, would be bound, and so it was held in the City of Oswego vs. Oswego Canal Co. (6 N. Y. 257). . . .

"But what is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way."

In Lahr vs. Met. El. R. R. Co. (*supra*), we quote these paragraphs from the syllabus:

"An elevated railroad in a street of a city, supported by columns placed along the outer line of the sidewalks, and operated by steam power, is a perverter of the use of the street from the purposes originally designed, and is a use which neither the city authorities nor the Legislature can legalize or sanction, without providing compensation for the injury inflicted upon property of abutting owners.

"Abutters upon a public street of a city, claiming title to their premises by grant from the municipal authorities, which grant contains a covenant that a street to be laid out in front of such property shall continue forever thereafter as a public street, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air."

No one can carefully read these important and much discussed cases, without at once perceiving the peculiar conditions, with reference to which they were decided, which distinguish them from cases such as the present. The bills of complaint in these cases were framed to logically meet the contention, that the building of the elevated railroad on the street and in front of the houses occupied by the complainants, was a physical taking of property without compensation, and the prayer was in the alternative, for the payment of such damages assessed by a referee duly appointed, or an injunction to restrain further building or operation of the road until such damages were paid.

All this is clearly pointed out by the author, in Pomeroy's *Equity Jurisprudence*, Vol. 5, Sec. 470.

Notwithstanding the disclaimer of complainant's counsel, that the action below was based upon any allegation of negligence, the prayer of the bill and a part of the argument of counsel compel us to turn to that aspect of the case, as to which claim is made for an injunction and damages, on the ground that the nuisance produced by the smoke, vapors, and noises emanating from defendant's railroad, were due to its negligent operation.

A careful examination of the testimony in this case does not permit us to find that the annoyance complained of (and we do not doubt that it was serious in its character) was due to negligence on the part of the defendant. That an unnecessary amount of black smoke may at times, from particular engines, have been emitted, is quite probable, but there is no evidence to convince the court that the road was operated without due care in respect to the firing of its locomotives. There is no charge, as in the "Bunting" case, much less any evidence

amounting to proof, that the defendant was negligent in not using other fuel than bituminous coal, or that it was possible to have used such other fuel and successfully have carried on the business of the railroad. Nor was there any direct evidence on the part of the complainant, of such negligence in the operation of the road and the firing of the engines, as would account for the nuisance complained of. On the contrary, the evidence of the defendant, consisting of the various printed instructions given to its firemen at different times, and the testimony of Alfred W. Gibbs, its chief mechanical engineer, shows the efforts made by the defendant to so manage its locomotives as to minimize the emission of smoke, and would seem to dispose of the suggestion of liability on the ground of negligence.

Moreover, the prayer of the bill, as framed, does not ask for such definite and specific exercise of injunctive relief, as would be reasonably enforceable. There is no specific allegation or proof of the particular conduct or practices which constitute such negligent operation of the road as cause the annoyance in question, and which, if established, should be enjoined. There is no allegation and no showing that other fuel could reasonably have been used by the defendant for the lessening of the smoke, upon which a mandatory injunction could be asked, requiring the use of such fuel, or a direct injunction on that ground against the use of soft or bituminous coal.

No specific act or acts of misfeasance or nonfeasance, constituting negligence on the part of the defendant, and as such the cause of the grievance complained of, has been so sufficiently alleged or proved as would enable a court of equity effec-

tively to prevent its continuance. Of course, if complainant's principal contention (presumably founded upon the mistaken allegation that defendant's road was maintained and operated upon Sixth Street) had been established, the existence of the road itself on Sixth Street would, so far as the property of complainant situated on that street was concerned, and such property alone, have been a taking of complainant's property without compensation, and entitled it to an injunction against the operation of such road until such compensation had been duly ascertained and paid, conformably to the doctrine of the New York Elevated Railroad cases, as above referred to.

The prayer of the bill, as we have seen, asks for an injunction, commanding the defendant, its servants, &c., to absolutely desist and refrain from so operating its said railroad locomotives and engines as to cause or permit black smoke, &c., from its said engines and locomotives, to fall upon or enter into the premises and structures of complainant "in such appreciable quantities as to interfere with the reasonable use and enjoyment thereof."

We have already shown that no case has been made out for such a general injunction as this. In the absence of any determination in a suit at law, as to the fact of negligence by the defendant in the operation of its road, in the respect referred to, a court of equity would be embarrassed in undertaking, by its decree, to enjoin the defendant against the issuing of more soot and cinders than was necessary to the careful and proper operation of its road. Such a decree would be futile and unenforceable.

Assuming, however, that the bill had been duly

amended in the important respect we have pointed out, to wit, the location of the road on the route acquired by the plaintiff south of Sixth Street, and not on Sixth Street itself, and that sufficient averments of negligence, general and specific, were contained in the bill, we are constrained to find that the record fails to disclose sufficient evidence to amount to proof of such negligence, or that the acts of defendant, in the operation of its railroad, have constituted, and do now constitute, an actionable nuisance and are so unnecessary, avoidable, and unreasonable as to warrant the issuing of an injunction, restraining the defendant from the commission of such acts.

Without at all minimizing the annoyance and discomfort suffered by the complainant, as set out in its bill of complaint, this case cannot be taken from without the operation of the principles which we have already discussed, and which were so clearly announced in the case of Beseman vs. Penna. R. R. Co. In the absence of clear proof of negligence on the part of the defendant, the right of action or the right of equitable relief cannot be made to depend upon the greater or less degree of the annoyance complained of. As said in the Beseman case, "when property has been incidentally injured, no matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless, and it has never been supposed that the property so injured was taken, in the constitutional sense, for the public use."

In the view here taken, it is unnecessary that we should express any opinion as to the defenses of "laches" and "prescription," urged by defendant's counsel.

For the reasons stated, the decree of the court below, dismissing the bill of complaint, is hereby affirmed.

(Received and filed. August 25, 1913. Saunders Lewis, Jr., Clerk.)

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD
CIRCUIT.

MARCH TERM, 1913.

No. 1734. (List No. 47.)

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA,
JERSEY CITY,
Appellant,

vs.

PENNSYLVANIA RAILROAD
COMPANY,
Appellee.



**APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES, FOR THE
DISTRICT OF NEW JERSEY.**

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

GEO. GRAY,
Circuit Judge.

Philadelphia, August 26, 1913.

Endorsed: No. 1734. Order affirming decree.
Received and filed August 26, 1913.

SAUNDERS LEWIS, JR., Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD DISTRICT.

<p>THE ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF PADUA, JERSEY CITY, <i>Complainant and Appellant,</i></p> <p style="text-align: center;"><i>against</i></p> <p>THE PENNSYLVANIA RAILROAD COMPANY, <i>Defendant and Appellee.</i></p>	} In Equity.
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APPEAL AND ALLOWANCE.

The above named complainant, the Roman Catholic Church of St. Anthony of Padua, Jersey City, N. J., feeling itself aggrieved by the decree made and entered in this cause on August 26th, 1913, and filed in the office of the Clerk of the Court affirming a decree of the District Court of the United States for the District of New Jersey dismissing the bill of complaint herein, with costs, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignments of errors filed herewith, and it prays that this appeal may be allowed and that a citation issue as provided by law; and that a transcript of the record and proceedings, evidence and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, and that the said decree of said Circuit Court may be reversed and such decree made as to said Supreme Court of the United States shall seem meet and proper.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal *to be made.*

FRANK M. HARDENBROOK,
*Att'y for Plaintiff and Appellant, The Roman
Catholic Church of St. Anthony of Padua.*
#15 Exchange Place, Jersey City, N. J.
Jersey City, N. J. _____, 1913.

And now, to wit, on Sept. 27, 1913, it is ordered
that the appeal be allowed as prayed for.

JOHN B. McPHERSON,
*Judge of the United States Circuit Court of
Appeals for the Third District.*

Endorsed: No. 1734. Petition for Appeal, and
Order allowing same. Received and filed Septem-
ber 26, 1913.

SAUNDERS LEWIS, JR., Clerk.

SUPREME COURT OF THE UNITED STATES.

OCT. TERM, 1913. No. 739.

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA,
Plaintiff and Appellant,

v.s.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant and Respondent.

BRIEF ON MOTION TO DISMISS APPEAL.

This motion is made to dismiss this appeal for the reason that, as the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship, the decree of the Circuit Court of Appeals is final under Section 6 of the Court of Appeals Act of 1891, 26 Stat. at Large, 828; Chap. 517 U. S. Comp. Stat. of 1901, page 549; approved March 3, 1911; U. S. Comp. St. of 1901, Supp. 1911, page 193, See. 128.

The jurisdiction of the Circuit Court (now the District Court) for the District of New Jersey was invoked on the 27th day of July, 1910, by the filing of the complaint, from which it appears that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship. It did not appear therefrom that jurisdiction was rested or could be asserted on any other ground.

These statutes were interpreted by this Court

in *Colorado Central Consolidated Company v. Turck*, 150 U. S., page 138; 37 L. Ed. 1030; in *Borgmeyer v. Idler*, 159 U. S. 408; 40 L. Ed. 199; *Press Publishing Case v. Monroe*, 164 U. S. 105; 41 L. Ed. 367; 17 Supreme Ct. Reports 40.

In *Arbuckle v. Blackburn*, 191 Supreme Court, page 40; 48 L. Ed., page 239, Chief Justice Fuller says:

"Reference to the Constitution, to strengthen objections to a particular construction or the pursuit of a certain course of conduct, is not sufficient to invoke jurisdiction. Whatever grounds of equity interposition may have existed here—and we express no opinion on that subject—the jurisdiction of the Circuit Court as a Court of the United States, depended alone on diverse citizenship. If the allegation of that fact had been omitted from the bill, the jurisdiction could not have been maintained."

So, in this case, if the allegation of the fact of diverse citizenship had been omitted from the bill, the jurisdiction of the Circuit Court, as a Court of the United States, could not have been maintained.

The respondents insist that the appeal should be dismissed.

JAMES B. VREDENBURGH,
Of Counsel with the Defendant.

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IN THE
Supreme Court of the United States.

OCTOBER TERM 1914.

No. 269.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY OF
PADUA,

Appellant.

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

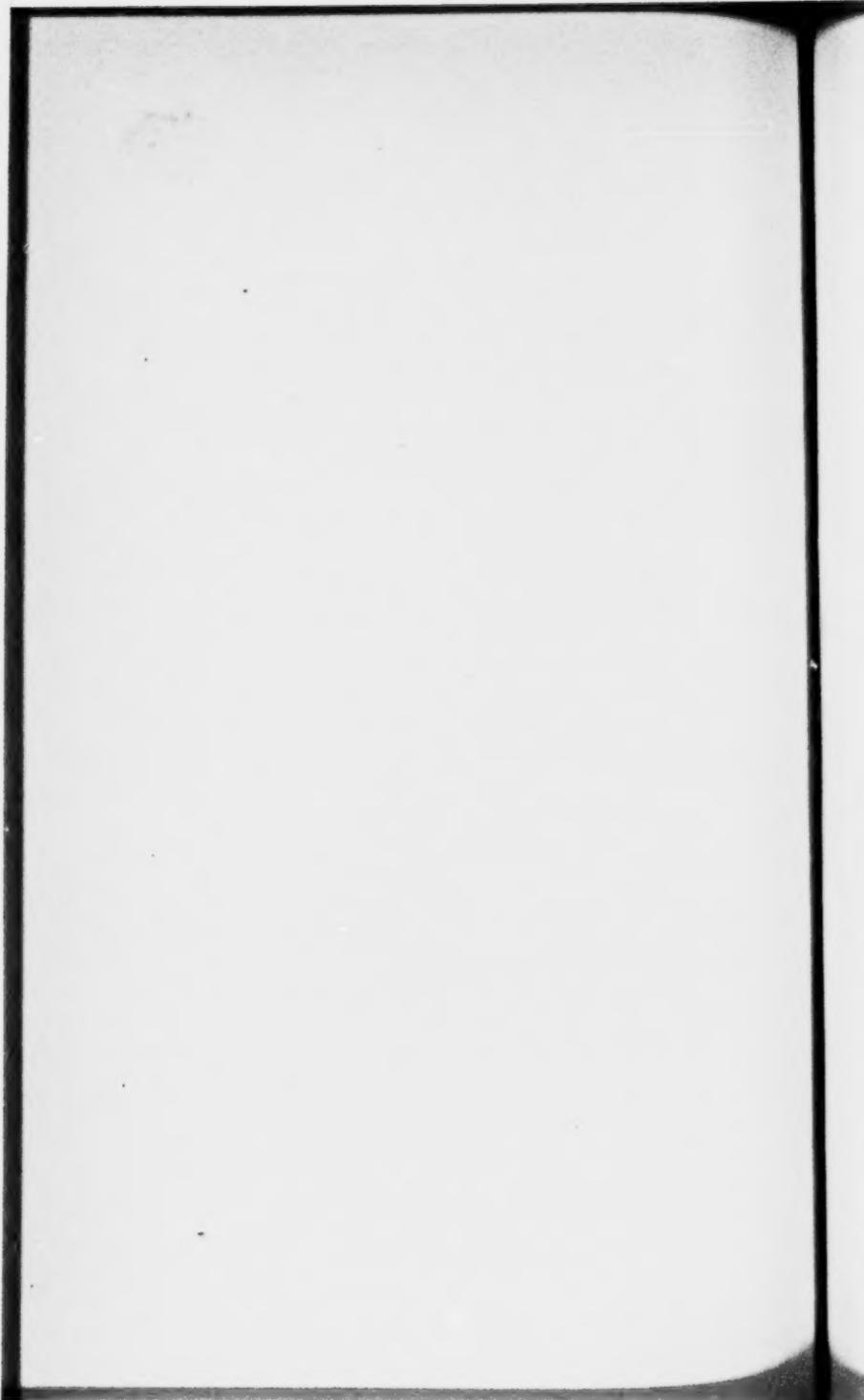
Appellee.

ON APPEAL FROM THE UNITED STATES CIRCUIT
COURT FOR THE THIRD CIRCUIT.

BRIEF FOR APPELLEE.

JAMES B. VREDENBURGH,
Attorney for Appellee.

JAMES B. VREDENBURGH,
ALBERT C. WALL,
Of Counsel.



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Supreme Court of the United States.

ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA,
Appellant-Complainant,
vs.
THE PENNSYLVANIA RAILROAD
COMPANY,
Appellee-Defendant.

Appeal
On Bill for
Injunction
and Damages.

BRIEF FOR APPELLEE.

Parties.

The Roman Catholic Church of St. Anthony of Padua is the sole appellant, and
The Pennsylvania Railroad Company is the sole appellee.

The Nature of the Proceedings.

Bill in Equity; Answer; Proof and Final Decree.

Abstract of Pleadings.

The Bill of Complaint alleges that complainant is a religious corporation, and has been engaged in that work since 1884, upon the lands and premises described in the Bill.

2. That the defendant was incorporated in the State of Pennsylvania in 1846, as a common carrier, with authority to lease, hold and operate a line of railway in the States of Pennsylvania and New Jersey, and as such,

“ * * * at all the times hereinafter mentioned, has maintained and operated, and still maintains and operates a railroad with its main and side tracks, locomotives, freight and passenger cars, upon what is known as Sixth Street in Jersey City, Hudson County, New Jersey.”

3. That on the 20th day of December, 1884, the plaintiff became the owner of three lots in Jersey City, fronting on the westerly side of Monmouth Street, and erected thereon a church, and has since occupied the same.

4. That on May 10th, 1893, it became the owner of another lot on Sixth Street, near Monmouth, and erected thereon a residence for the priest attached to the said church.

5. That on June 11th, 1898, it became the owner of four other lots on Sixth Street and erected thereon a school building, and has used the same ever since as a school for upwards of eleven hundred children.

6. That on August 11th, 1902, it became the owner of a lot of land on the northerly side of Sixth Street and erected thereon an addition to the said residence of the officiating priest.

7. That on March 20th, 1905, it became the owner of a lot on the southerly side of Seventh Street.

8. That it erected immediately on the land described in the seventh paragraph, a large Home for Sisters and female teachers connected with the said church, and it has been occupied as a Home ever since.

9. That the buildings erected are of a substantial construction and, except for the acts of the defendant, would be adapted for their respective purposes; and that the immediate neighborhood has long been, and now is, thickly populated and exclusively a residential neighborhood.

10. That the defendant, for upwards of six years last past, in the operation of its railroad, has maintained and operated upon said Sixth Street and immediately to the south of the lands of the plaintiff, a line of railroad tracks upon which it operates a great number of freight and passenger trains and cars, switch engines and locomotives, which continuously, at all hours of the day and night, pass upon said tracks, the lands premises and structures of the plaintiff, each making its characteristic noises, and which locomotives are now burning, and for upwards of the past six years have continuously burned vast quantities of soft or bituminous coal, and from the burning and partial combustion of which there arise, and continuously for upwards of six years, have arisen from the smoke-stack connected with the said locomotives and engines, dense volumes of black smoke, soot, cinders, ashes, noxious and unwholesome gases, offensive odors and vapors, which are carried into, upon and through the lands, structures and premises of the plaintiff, seriously injuring the buildings and their use for

the purposes aforesaid; thereby causing the plaintiff great damage; to the damage of the plaintiff in the sum of fifty thousand dollars.

11. That the acts of the defendant have taken from the plaintiff property consisted of the easement of light and air, without due process of law and without compensation. That the same is a violation of the provisions of the Constitution of the United States.

12. That the said acts of the defendant are a nuisance and a special injury to the plaintiff and are unnecessary, avoidable and unreasonable and not necessarily connected with the construction or reasonable operation of the said railroad. Which acts are continuous and will cause great and irreparable loss to the plaintiff and subject the plaintiff to the prosecution of a multiplicity of suits for damages unless the defendant be restrained by injunction.

13. All which acts are contrary to equity.

The relief prayed for is that the defendant may be decreed to pay to the plaintiff the sum of fifty thousand dollars damages.

Writ of injunction, commanding defendant, its agents, servants and employees, to absolutely desist and refrain from so operating its said railroad, locomotives and engines as to cause or permit black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust, noxious and unwholesome gases and offensive odors or vapors from its said engines and locomotives to fall upon or enter into the premises and structures of the plaintiff in such appreciable quantities as to interfere with the reasonable use of the same by

the plaintiff and the priests connected therewith, and persons using the said respective premises of the plaintiff.

Defendant demurred.

The Court overruled demurrer.

Defendant answered.

Abstract of the Answer.

The Answer denies that the defendant has ever built, maintained or operated a railroad on Sixth Street, Jersey City.

It alleges that, as lessee, it has maintained and operated, since 1871, an elevated railroad with five tracks, on the duly authorized right of way of The United New Jersey Railroad and Canal Company, on land between Fifth and Sixth Streets, but not on any part of Sixth Street.

It insists that, by force of franchise derived from grants from the State of New Jersey, it runs its trains of cars thereover, carrying freight and merchandise. It insists that it operates its engines and trains thereover with care and skill.

It insists that, by statute and prescription, it has acquired the right to so operate this railroad.

Formal replication.

Judgment of the District Court.

Record, p. 319, adjudges:

1. That appellee does not operate its railroad on Sixth Street.
2. That appellee does not take from appellant's property to which appellants are legally entitled.

3. That the acts of the appellee in the operation of its railroad are not so unnecessary, avoidable and unreasonable as to warrant the issuing of an injunction restraining it from the use of soft or bituminous coal in the operation of its railroad.

4. That bill be dismissed.

Judgment of the Circuit Court of Appeals.

The decision of the District Court was affirmed. Record, p. 477. The opinion is found on page 459 of the Record, and also in 207 Fed. Rep., p. 897.

Errors Assigned.

Sixty-six errors are assigned.

(Record, pages 320 to 327.)

(Record, pages 479 to 485.)

Statement of Case

Appellee Controverts Appellant's Statement of Case.

The appellee is a corporation of the State of Pennsylvania, in possession of and operating this railroad as tenant, under a lease dated June 30th, 1871, validated by an Act of the Legislature of the State of New Jersey (Record, p. 382, Laws of 1873, p. 1298).

The Landlord, The United New Jersey Railroad and Canal Company, a corporation of New Jersey, upon whom is placed the public duty of operating

this railroad, is not a party to this suit, although its interest may be affected by the decree.

The object of the suit is to recover damages for certain trespasses to land adjacent to the right of way of appellee in Jersey City, resulting from the operation of the railroad, and to enjoin trespasses of the same character.

These trespasses are of the same kind and character as the trespasses declared in the case of *Beseman* against the same appellee, reported in 21 Vr., 237. The lands in that case were situated in the same part of Jersey City, adjoining the railroad, on Fifth Street.

On March 30th, 1868, the Legislature granted to the lessor of the appellee, to enable them to increase their depot and terminal facilities at Jersey City, a large tract of State land lying between high water mark and the deep water of the Hudson River, and authorized them to acquire and construct an elevated railroad 100 feet wide, with as many sets of tracks and rails as the Company should deem necessary, from this tract to the main line of its road at Bergen Hill (record, p. 384).

In 1873 the right of way had been acquired and the railroad had been constructed and was being operated (Gardner, Record, p. 281, line 12). It consisted of two tracks on a wooden trestle (record, p. 282).

In 1887 an embankment 100 feet wide, with stone retaining walls on each side, was substituted for the trestle (record, p. 282). The top of this embankment is generally eighteen feet above the level of Sixth Street. The whole of the embankment is to the south of Sixth Street; seven tracks

on the embankment; no portion of the tracks or of the embankment is located on Sixth Street (record, p. 281; Exhibit 7, p. 280).

There has been no change of the number of tracks on this embankment since 1887 (p. 282).

From 1873 to the year 1905 the use of these tracks in the transportation of freight increased, but since 1905 remained stationary.

The exhibit (record, p. 345) shows that there was an average monthly movement of about two thousand trains over these tracks, from 1905 to 1911, and that the train movements did not increase in number.

The locomotives by which the trains are moved always burned coal; and, from the burning of this coal characteristic smoke arose from the smoke-stacks, and the cinders and dust forming this smoke were carried from this right of way to the adjacent lands, in different directions and different distances, depending upon the force and direction of the winds.

The church fronts on Monmouth Street, not on Sixth.

A four-story brick building, twenty-five feet in width, intervenes between the church property and Sixth Street. This building is neither owned by, nor in possession of, appellant..

All other property within an equal distance from the railroad must be similarly affected by the operation of the railroad.

The railroad has been operated in the same way by steam engines since 1873—forty years.

Facts Found by the Circuit Court of Appeals.

The opinion of JJ. Gray, Buffington and McPherson says:

"These allegations of the answer, for the most part, especially those in regard to the legislative history and operation of the railroad during the period since 1871, are not denied, and from the answer and evidence we may also take as undisputed, the following facts:

"In 1887 an embankment 100 feet wide, with stone retaining walls on each side, was substituted for the trestle. The top of this embankment is generally 18 feet above the level of Sixth Street. The whole of the embankment is to the south of Sixth Street, and of the tracks on the embankment, no portion of the same, or of the embankment, is located on that or any other street but entirely on the land or right of way of the defendant company.

"There has been no change in the number of tracks on this embankment since 1887.

"From 1873 to 1905, the use of these tracks in transportation increased, but since 1905 has remained stationary.

"The locomotives by which the trains are moved have always burned bituminous coal, from the burning of which characteristic smoke arose from the smoke-stacks, and the cinders and dust forming this smoke were carried from this right of way to the adja-

"cent land in different directions and different distances, depending upon the force and direction of the wind. The church of complainant fronts on Monmouth Street, not on Sixth Street. A four-story brick building 25 feet in width, neither owned by nor in possession of the complainant, intervenes between the church property and Sixth Street. All other property within an equal distance from the railroad, must be similarly affected by the operation of the same.

"It is also admitted that owing to the nearness of this portion of the branch road to the freight terminal at Harsimus Cove, the road having been built to connect the said Harsimus Cove with the main line at Bergen Cut, the tracks on the south side of Sixth Street between Monmouth and Brunswick Streets, are much occupied by shifting engines and in the making up of trains incident to terminal operations.

"It is admitted that no portion of the railroad is on Sixth Street, as alleged in the bill of complaint, but is situated on a strip of land 100 feet wide south of Sixth Street and running parallel therewith, and we shall consider the bill as if amended in that important respect."

Brief of Argument.

1. Appellee is not operating a railroad on Sixth Street.

2. It is settled law of the State of New Jersey that railroad companies are not responsible for

damages to adjacent lands, occasioned by their operation of trains in accordance with their charters, with care and skill on their rights of way.

M. & E. R. R. v. Newark, 10 N. J. Eq. 352;
Beseman v. Penna. R. R., 50 N. J. L., 237;
Beseman v. Penna. R. R., 52 N. J. L., 221;
Church v. R. R., 46 Eq., 376;
M. E. Church v. Penn. R., 48 Eq., 455;
Stockton v. Central R., 50 Eq., 72;
Hayes v. W. & P. R., 51 Eq., 350;
Ridge v. Penn. R., 58 Eq., 176;
Marcus Sayre Co. v. Newark, 60 Eq., 361;
Simmons v. Paterson, 60 Eq., 385;
Thompson v. Penna. R., 51 N. J. L., 43;
Costigan v. Penna. R., 54 N. J. L., 236;
Roebling v. Trenton R., 58 N. J. L., 674;
Church v. Paterson R., 68 N. J. L., 410;
Jenkins v. Penna. R., 67 N. J. L., 332;
Vallaster v. Atlantic City, 72 N. J. L.,
334;
West Jersey R. v. Abbott, 60 N. J. L.,
152.

3. The courts of the United States will follow the settled decision of the Senate courts as to a rule of real property.

Sampson v. Williamson, 24 How. 427; 16
L. E., 742.

4. The courts of the United States have not adjudged that a railroad company is responsible for damages to property adjacent to their right of way, resulting from the operation of trains with care and skill on their right of way.

5. No issue that appellee was negligent in the operation of trains on its railroad.

6. An injunction should not issue to restrain the appellee from discharging from its engines more (sic) smoke, and making by its trains more noise than authorized by its charter:

(a) Because the fact is denied, and its existence has not been established by a trial at law.

(b) Because the appellee has for many years operated its railroad substantially as it does at the present time.

(c) Because the Law courts afford a plain, adequate and complete remedy.

16 Sec. Judiciary Act R. S., 723;

New York Guaranty & Indemnity Company v. Memphis Water Company, 107 U. S. 215; 27 L. E. 484.

(d) Because of the issue of prescriptive rights.

(e) Because of laches.

7. Multiplicity of suits not a ground in this case for equitable relief.

ARGUMENT.

I.

The Appellee is not operating its railroad in the street.

The allegation of the bill is (page 1, par. 2, line 30)

"That the defendant has maintained and operated and still maintains and operates a

railroad with its main and side tracks, locomotive, freight and passenger cars upon what is known as Sixth Street, in the City of Jersey City, Hudson County, New Jersey.”

(Page 3, par. 10, line 41) :

“That the defendant, for upwards of the six years last past, in the operation of its said railroad, has maintained and operated upon said Sixth Street and immediately to the south of said lands, a line of railroad track upon which it operates a great number of freight and passenger trains, &c.”

(Page 5, par. 11, line 5) :

“That the said acts of the defendant have taken from your orator property consisting of the easement of light and air to which your orator is legally entitled, and deprived it of the same without due process of law and without just compensation; and that such acts of the defendant in such interference with and appropriation of said property of your orator has been and now is a violation of the provisions of the Constitution of the United States.”

The Answer (p. 7, line 39) joins issue thereon in the following language:

“But they deny that they (the defendants) as such, or in any other capacity, and at all times, or at any of the times mentioned in the bill of complaint, or at any other time, have maintained or operated, or that they still

maintain and operate a railroad with its main or side tracks, locomotives, freight and passenger cars, upon what is known as Sixth Street in Jersey City, Hudson County, New Jersey.”

“*Third.* These defendants, answering paragraphs 10, 11 and 12 of the bill of complaint, say: That they deny the truth of the statements set forth in said paragraphs, and of each and every one of said statements; and they say that they never have maintained or operated, and do not now maintain and operate any railroad upon Sixth Street in Jersey City, and they have not for upwards of six years last past, in the operation of their railroad, maintained or operated upon said Sixth Street a line of railroad tracks or any railroad tracks, or any freight or passenger trains or cars or switch engines or locomotives of any kind or character.”

On the issue thus made, the appellant has not sustained the bill of complaint.

That issue was found in favor of the appellee. This evidence shows that the railroad is not on any part of Sixth Street. It also shows that the appellee have never in the past, and do not now, maintain and operate a railroad with its locomotives, &c., on Sixth Street, Jersey City.

That the entire railroad is located on its right of way, on the block between Sixth and Fifth Streets, and is south of the street and eighteen feet above it.

On that issue, therefore, the decree must be affirmed.

The appellant, on the filing of the Answer alleging that the railroad tracks were not on Sixth Street, did not amend its bill of complaint.

It proceeded with the trial as if that issue were material.

The decision of the Court on the demurrer to the bill was based on the allegation of the bill that the acts constituting the alleged nuisance were committed by appellee while operating a railroad *in the street*. The opinion so recites, and the cases referred to in the opinion are cases in which the railroad was in the street. One of the cases referred to was *Chicago & G. W. R. R. v. M. E. Church*, 103 Fed., 85.

The Court, in that case, said:

"The smoke, cinders, offensive smells and loud and protracted noises which are a nuisance to the plaintiff, are not the consequential and unavoidable damage due from a lawful running of the defendant's trains over its tracks on this street, but result from the erection and use by the defendant of its water hydrant and station, the one in, and the other on, the street. * * * The abutting owners of property on a public street have as good a right to the free enjoyment of light and air as they have of the property itself."

In another *Angell v. Penna R. R.*, 14 Stew. E., 317, the railroad company was using the street in front of complainant's abutting premises, in a way unauthorized by the State, to the injury of complainant.

In another *Muhlker v. N. Y. & H. R. R.*, 197 U.

S., 544, the railroad company was operating its railroad on the street in front of complainant's house without having acquired the easements in the street reserved to the grantor by the terms of the deed to the city, conveying the land for the street.

It is difficult to see how the appellant could have imagined that the railroad was operated on Sixth Street.

The misstatement of the bill as to the location of the railroad enabled the appellant, on the argument of the issue raised by the demurrer, to insist that the appellee was on the street, and to cite with effect the language of Justice McKenna when speaking of a railroad operated in the street, in *Muhlker v. N. Y. & H. R. R.* above cited.

II.

It is the settled law of New Jersey that Railroad Companies are not responsible for damages to adjacent land, occasioned by their operation, with care and skill over their authorized right of way, under legislative authority.

The Pennsylvania Railroad Company is the lessee of the New Jersey Railroad and Transportation Company. Ex. D-2, p. 367.

The eighth section of the charter of the New Jersey Railroad and Transportation Company, P. L. 1832, page 96, reads as follows:

"Section 8. *And be it enacted,* That the said president and directors shall have power to charge and demand tolls and rates for the passage of all carriages upon said railroad or roads, and to fix, make, and at pleasure change and alter such tolls and rates, and also to make regulations and rules for the collection and levying of the same, and to regulate the time and manner of transporting goods and passengers, and manner of collecting tolls on the said railroad, and also the description and formation of carriages that shall or may be used on said railroad, and all necessary machines, engines, wagons, carriages or vehicles; *Provided*, That the said corporation shall cause the rates of tolls charged to be inscribed or painted in some conspicuous place at each gate where toll shall be required to be paid: *Provided, also*, that the said tolls so to be charged, shall at no time exceed the following rates, viz.: for an empty carriage, with its appendages, weighing less than one ton, two cents per mile; above one and under two tons, four cents per mile; above three tons or more, eight cents per mile; and the following additional tolls for passengers and freight, viz.: in the carriages as charged as aforesaid, for every species of property, six cents per ton per mile, and three cents per mile for each and every passenger carried on said railway, in said carriages; *and provided, also*, That no farmer belonging to this State, shall be required to pay any toll for the transportation of the

produce of his farm to market over the said road or roads, in his own carriage, weighing not more than one ton, when the weight of such produce shall not exceed one thousand pounds, but the said farmer may be charged toll as for an empty carriage; *Provided also*, That it may be lawful for the said company to erect and build a branch railroad from their present route, or railroads, to any landing on or near the Passaic River, not north of Bellville, or to any point or points within the township of Newark, as may be deemed expedient, and to charge tolls thereon in the same manner, and at the same rate, as this corporation is authorized to charge."

"The object of this section was to vest in the company the entire management of the business of transporting freight and passengers."

State, New Jersey Railroad and Transportation Pros, v. Jersey City, 5 Dutch., 174.

The appellant insisted below, and insists by its brief here, that the courts of the United States will restrain the railroad company from running its trains on its right of way, if thereby it unreasonably interferes with the appellant's reasonable use of adjacent lands, notwithstanding such interference necessarily results from the exercise of its legal right under legislative authority and is only consequential.

The appellee insists that no action will lie because of consequential injuries necessarily result-

ing from the exercise by the appellee of its right under legislative authority, to operate its trains over its right of way, with care and skill, and that such is the settled opinion of the courts of the State of New Jersey.

Such legislation is not a violation of the Constitution of New Jersey.

The only provision of the Constitution with reference thereto is Paragraph 17 of Article I, which is as follows:

"Private property shall not be taken for public use without just compensation."

Beseman v. Penna. R. R., 50 N. J. L., 237, was an action of tort to recover damages to land adjacent to this same right of way—

The declaration alleged that the plaintiff was the owner of certain lots of land in Jersey City, fronting on Fifth Street, with dwelling houses thereon, and that the defendant had built an elevated track for a railroad near the said dwelling houses and had used the said track so elevated for the passage of locomotives and cars, and had

" * * * * during all the time aforesaid, both in the daytime and at all hours of the night-time, wrongfully caused (among other things) great and unusual noises in the neighborhood of said dwelling houses, and caused divers noxious, unwholesome and offensive vapors, fumes, smokes, smells and stenches to flow and arise around said dwelling houses,

thereby also jarring the doors and walls of said dwelling houses, and breaking the plaster of the walls, and by the means aforesaid had driven the tenants from said houses and rendered the same untenantable and unfit for use, &c."

To this declaration the Pennsylvania Railroad Company, as in this case, pleaded the chartered rights of the United New Jersey Railroad and Canal Company, the successor of the New Jersey Railroad and Transportation Company to locate its right of way and construct its railroad thereon; and that, in order to carry into effect the objects of the incorporation, it did use the same in the prosecution of its business as a common carrier of passengers and freight, during the time mentioned in the declaration, as it lawfully might do; and did thereby necessarily create some smell, noise, smoke and vibration, as it lawfully might do for the causes aforesaid.

The plaintiff demurred to this plea.

The issue so joined was argued at the June Term, 1887.

The opinion was not handed down until February Term, 1888. It was delivered by Chief Justice Beasley, who had been Chief Justice from 1864. The court said:

"That defense, stripped of all verbosity, is that, by force of its franchise derived from the public grant, it has built its road and run its trains, carrying merchandise and freight near to the lands of the plaintiff, doing the plaintiff no more damage than that which

necessarily results from the transaction of such acts and business. Its position is that for such incidental and unavoidable damage it is not responsible.

"The plaintiff occupies the opposite ground, claiming that, with respect to private property, a railroad is *per se* a nuisance whenever it throws a detriment such as would be actionable at common law, on such property."

"Therefore, if the maxim asserting the universality of the redress provided by the law for wrongs would, by its terms extend to the damage sustained by the plaintiff, in its practical application, it would be kept within expedient bounds. But in truth, to take this maxim as the rule in the present case, is to assume its fundamental term—that is, to presuppose that a wrong was committed by the mere act of running these trains. This is the very point in controversy, for the defence is that the Legislature could dispense the company from responsibility for such damage, and that it has done so.

"This latter contention must, I think, be sustained. The legislative power is amply competent for such a purpose, and it is obvious that it has put forth such power. It is a radical error to regard these corporations as simply private. They have a public as well as a private aspect, and it is on this account that the immunity in question belongs to them. * * *

"In support of the contrary view, the counsel of the plaintiff relies on two cases, viz:

Pennsylvania R. R. Co. v. Angell, 14 Stew. Eq., 316 and *B. & P. R. R. Co. v. Fifth Baptist Church*, 108 U. S., 328. Neither of these decisions is in point, and the principle of law declared in the latter is directly adverse to the proposition laid as the basis of this suit. The former of these precedents presented to the court the naked proposition whether the railroad company, the defendant in the proceeding, should be restrained from doing certain acts which were obviously *ultra vires*. The court found as a fact that the defendant was doing continuously, to the detriment of the complainant, that which was entirely unauthorized by its charter; and the case did not call for any expression of opinion on the part of the tribunal as to the effect of incidental damage done by the road in the necessary operation of its business. The case has no value as a precedent, beyond this.

"There is but a single case in this State in which the present question has been placed directly *sub judice*. In *Morris & Essex R. R. Company v. the City of Newark*, 2 Stockton, 352 (decided in 1858), the owners of land abutting on the street along which the railroad company had laid a track, complained that their property was incidentally injured by the running of the trains; but this was treated as *damnum absque injuria*, this being the language of the Chancellor, viz.: 'It follows, further, admitting the correctness of the views expressed, that the adjacent land-owner cannot maintain an action at law for

consequential damages, unless he can show a negligence exercised by all the company, of their legal rights, because no action at law will lie for a consequential injury necessarily resulting from the exercise of a legal right under legislative authority.' And some of the New York decisions already cited were referred to in corroboration of the views thus declared."

The Chief Justice points out that the doctrine maintained by the plaintiff would make railroads general tort feasors, and calls attention to the fact that their tracks run for miles through the cities of the State, and every landowner on each side of the track would be entitled to his action; and also, that if the rights of action did exist, it follows necessarily that each of the persons in whom they are vested can prevent the continuance of the wrong out of which such rights of action arise and said

"If this plaintiff should recover two or three verdicts against the defendant, because of the damage that is inseparable from the running of its trains, there is plainly no ground on which the Chancellor could refuse to enjoin the continuance of the nuisance, nor does there appear to be any relief from such a consequence. The aggrieved landowner would be the master of the situation, for there is no law by force of which the company could take his lands *in invitum*, or compel him to have his damages assessed once for all. In short, the plaintiff's claim in-

volves the assertion that he can put a stop to the business of the defendant at the point in question. * * * Those laws, in providing for the acquisition and condemnation of lands, authorize the taking of such lands only as are requisite for the necessary structures of the road and the accommodation of its business, and require the payment of damages only to that class of land-owners. These corporations are not permitted to sequester any other property nor to compensate for other damages. The central idea of the system is that for incidental damages these companies are not responsible. This system, now ancient and uniform, is now challenged in this case.

"And this, for at least a third of a century, has been the practical construction given by the courts of this State to the charters of these corporations. It has been the invariable course, so far as known, for juries to be instructed that these companies are not responsible for the result of the running of their trains, provided due care and skill be observed in the business."

"Nor have I found any serious constitutional difficulty with respect to this question. It has not been unobserved that it is said that as the Legislature cannot authorize by force of the Constitution of the State, property to be taken for public use without compensation, it follows that it cannot legalize an injury to such property. * * * * When property has been incidentally injured, no

matter to what extent, as an unavoidable result of a public improvement, such loss has always been deemed remediless and it has never been supposed that the property so injured was taken in the constitutional sense for public use. All the public improvements in the State have been built and are now resting on this foundation. For my part, therefore, I find no embarrassment in disposing of the present subject, for I have put railroads in the category of public agents and have regarded them as possessed of all immunities in the particular question belonging to such an office."

This judgment was reviewed by the Court of Errors and Appeals, in the November Term, 1889, by the full Court, and was unanimously affirmed, that Court saying that they "affirmed the judgment for the reasons given by the Supreme Court" (23 Vr., 52 N. J. L., 221). On p. 21 of Appellant's brief the statement is made in writing that the Beseman case was not decided by the highest court of the State. This statement is incorrect.

The principle so established has been affirmed by so many decisions in the State courts that it is a settled rule.

The following cases in New Jersey cite the Beseman case as correctly stating the rule of law:

Church of Holy Communion v. Paterson Extension Railroad Co., 46 Eq., 376, decided in 1890 by McGill, C.

Simmons v. Paterson, 60 N. J. Eq., 385, decided in November Term, 1890, in Court of Errors and Appeals.

May Term, 1891; *Methodist Episcopal Church v. Pennsylvania R. R.*, 48 Eq., 455.

May Term, 1892: By Chancellor McGill, in *Stockton v. Central Railroad Company*, 50 Eq., 72.

May Term 1893: By Chancellor McGill, in *Hayes v. Waverly & Passaic R. R. Company*, 51 Eq., 350.

1899: *Ridge v. Penna. R. R. Company*, 58 Eq., 176, by Judge Reed.

Marcus Sayre Company v. Newark, 60 Eq., 362, decided in 1899 in the Court of Errors and Appeals; Justice Dixon said (who decided the case of *State v. Angell*):

“The principle laid down by the Supreme Court in *Beseman v. Penna. Railroad Company*, 21 Vr., 235, and approved by this Court in 23 Vr., 221, disposes of this phase of the controversy. The principle is that if a corporation, though private, in the reasonable exercise of a franchise lawfully granted to it for a public purpose, cause an incidental damage to private property, such damage is *damnum absque injuria*.”

Justice Depue, in the same case, on page 376, says:

“The legal rules that control where an injury to private property is occasioned in the course of the exercise of legislative authority, were adjudged in *Beseman v. Pennsylvania R. R. Company*, and affirmed in this Court.”

And further, on page 377:

“The doctrine adjudged in the *Beseman*

case accords with the decisions of the English courts."

(Citing English authorities.)

In *Thompson v. Penna. R. R. Company*, Nov. Term, 1888, 51 Law, page 43, by Justice Knapp.

In *Costigan v. Penna. R. R. Company*, 54 L., 236-7, decided in 1892, by Justice Depue.

In *Roebling v. Trenton Ry.*, 58 N. J. L., 674, in 1896, by Justice Depue.

In *Church of the Holy Cross v. Paterson R. R.*, 68 N. J. L., 410, in Court of Appeals, in 1903 Justice Collins said:

"For the normal result of the operation of a railroad, an adjoining landowner has no redress. *Beseman v. Penna. R. R. Company*."

Jenkins v. Penna. R. R. Company, in Court of Appeals, in 1901, 67 L., page, 332, Opinion by Justice Pitney.

While the *Beseman* case is not cited in the Opinion of the Court in that case, it is apparent from the language of that opinion that the parties and the court took for granted that it was the settled law that railroad companies were not responsible for damages to adjacent lands, occasioned by smoke from their locomotives, when operated with care and skill over their authorized right of way.

The many cases in New Jersey for damages resulting from fire from locomotives are controlled by the same principle. Of these, one of the latest is *Vallaster v. Atlantic City R. R.*, 72 N. J. L., 334, the syllabus of which is:

"A railroad company which uses upon its engine a spark-arrester in good condition, of a design in common use, is not liable for damages resulting from fire caused by sparks escaping through such spark-arrester."

In the Court of Errors, *West Jersey R. R. v. Abbott*, 60 N. J. L., 152, Chief Justice Magie said:

"Railroad companies have authority to use the dangerous element of fire in the propulsion of their trains. The danger is in the escape of the fire they are permitted to use, upon adjoining lands, to the destruction of property thereon. In the absence of statutory regulations in respect to the precautions to be taken by railroads against such danger, doubtless, the companies using, though by authority, the dangerous machines would, upon the principles of the common law, be under a positive obligation to employ all reasonable precautions against doing harm thereby to others. But in that case a requirement that a railroad company should, in times of excessive drought, absolutely prevent all escape of fire from its engines or be liable for the consequences, would be, not a reasonable, but an unreasonable, rule of precaution, for it seems that no device has yet been invented that will absolutely and at all times control the escape of sparks capable of igniting inflammable matter. Such a rule, therefore, would compel the companies either to abandon their duty to the public in running

their trains, or be answerable for every fire communicated, no matter how cautious they had been in using the best practicable means to prevent its escape."

Other States.

The case of *Beseman against The Pennsylvania Railroad Company* established a principle with reference to a subject about which there has been a great deal of litigation in other States. It has been frequently cited and discussed in the courts of final resort of many of the States. So that it has become a leading case on this subject.

It has, with one exception, been approved whenever referred to.

In 1905, in the Kansas Supreme Court, in *Atchison, Topeka & Santa Fe R. R. Company vs. Armstrong*, 1 L. R. A. N. S. 113, it was cited approvingly and quoted from.

In that case the plaintiff sued to recover damages in two causes of action, the first being based on injuries sustained by being deprived of his access to his property, and the second, on injuries resulting from his residence being permeated with cinders, smoke and gas from defendant's locomotive engines.

It happened that several years after the railroad company built its road, the plaintiff erected a valuable residence adjoining. After the residence was built, the railroad company lowered its roadbed to such a depth that the smokestacks on its engines were on a line with the surface of the earth. The evidence was that, as a result of the

tracks being lowered, the smoke, cinders and gas emitted from the engines could not rise before reaching plaintiff's residence, and were blown therein, thereby injuriously affecting the health of himself and family and greatly damaging and decreasing the value of his residence property.

He recovered in the lower court and the railroad company brought writ of error.

When the case was first submitted to the Court, doubts were entertained of the right of the plaintiff to recovery for damages to his residence by reason of the smoke, gas and cinders. Thereupon the court deduced from the evidence and findings the following question, and resubmitted it for argument:

"Where a railroad company constructs and operates its road on its own land, in a proper manner, is it ever liable to the owners and occupants of adjacent property for consequential damages arising from their residence becoming permeated with smoke and offensive odors from its engines, which injuriously affect the health of such occupants?"

On the reargument both counsel presented briefs which are printed in the report of the case.

One of the points presented in the brief of counsel for the plaintiff was this:

"Where the injury is more than a mere annoyance and is so serious as to result in a depreciation in the value of real estate, or becomes injurious to the occupants, the injury amounts to a taking for which compensation must be made."

Many cases are cited in support of this contention, among others, the *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S., 317.

The attorneys of the railroad company maintained that, in the accomplishment of works of a public nature, in or over which the State maintains an interest or control, the Legislature may validly permit the doing of incidental damages to property of private individuals without liability therefor. Citing a page of cases in England and the United States, and, among others, the case of *Beseman v. Penna. R. R. Company*.

The Court, in its opinion on this second argument, says:

"Railroad companies are public corporations, organized and maintained for public purposes. Railroads cannot be operated without causing more or less inconvenience to the public, and discomfiture and possible damage to persons living adjacent to their lines. All such inconveniences and incidental damages must be endured by the individual, for the general good. Such private inconvenience and injuries result in a less degree to persons who live along public highways, from dust arising from the passage of teams and wagons. For such injuries the law provides no remedy. This and similar questions have arisen in other courts of this country and, so far as this court has been able to ascertain, a recovery has generally been denied, unless given under some constitutional or statutory provision."

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And quotes, among other cases, from *Parrot v. Cincinnati, H. & D. R. Co.*, 10 Ohio St., 624, the following language:

“That a railroad authorized by law and lawfully operated, cannot be deemed a private nuisance.”

And then says:

“As stated, there seems to be but little, if any, disagreement in the decisions upon this question.”

Quoting:

Beseman v. Penna R. R. Company;
Hatch v. Vt. R. Co., 25 Vt., 49;
Dunsmore v. Cent. R. R., 72 Iowa, 182.

And then says:

“Counsel for defendant-in-error cites the case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S., 317, as a decision contrary to the opinions here expressed.”

And, quoting quite freely from that case, the Court says:

“Thus it will be observed that the Court held that the railroad company exceeded its authority in building its shops where it did, and on that ground permitted the plaintiff to recover.”

The judgment of the lower court in favor of the plaintiff was reversed.

Taylor v. Seaboard Air Line Ry., decided November 6, 1907, Supreme Court of North Carolina, 59 S. E. Rep., 129, was an action by the Trustees of Oxford Presbyterian Church, situated, with a manse for the use of the pastor, on the east side of Gilliam Street, City of Charlotte, against the railway company, alleging that the property in question had been used by them for religious purposes since 1833, and that the railway company had located a station near to the church and had created a nuisance there to the plaintiffs, by the ringing of bells, sounding of whistles, blowing off of steam, and the loud puffing of engines, and by smoke, cinders, dust, foul and obnoxious and offensive odors from its engines, and in other ways specifically set out.

There was a demurrer to the complaint; an overruling of the demurrer, and an appeal.

On the appeal, Brown, Judge, speaking for the court, said:

"Applying the principle of law as laid down in the *Thomason* case, 142 N. C., 322 55 S. E., 205, we are of opinion that the court erred in overruling the demurrer. The several alleged facts charged against the defendant are well within its chartered powers, provided they are performed with reasonable care. It is out of the question in this advanced age, to apply to railways, our great arteries of commerce, the doctrines of the common law in relation to nuisances. As an eminent Judge has recently said, 'A rigid enforcement of rules and definitions announced

in an age that knew nothing of locomotives and blast furnaces, would have stopped the wheels of commerce, put out the fires of the furnaces and silenced the rattle of manufactures.' To deny to the defendant the use of its road and terminal, would be to exclude all railroads from our cities and towns. * * * In the *Elevated Railroad* cases, abutting property owners recovered permanent damages arising from smoke and noise, but upon the sole ground that the elevated structure invaded the owner's easement of light and air, and greatly interfered with means o' access to his property. Speaking of those cases, the Supreme Court of Georgia says, 'But in no case has the owner of property on a cross street or a parallel street, no matter how close to the elevated road, been entitled to recover, so far as we have found. And yet it is almost certain, on a business proposition, that persons owning property abutting on cross streets have found their property depreciated in value, as a result of the construction and operation of the elevated roads.'

"In this complaint there is no allegation of any physical interference with the plaintiff's property by defendant, from which damage may flow, as in the elevated cases. It is therefore manifest, from an unbroken line of precedents, that the mere establishment and proper use of a freight and passenger station across the street from plaintiff's property, does not constitute an action-

able nuisance. Established by the authority of law, all damage that flows from its reasonable and proper use, is *damnum absque injuria*. And it further follows that injuries and inconveniences to those who reside near this terminal, from noises of locomotives, shifting of cars, loading and unloading of freight, smoke, and the like, which result from the necessary and therefore proper use and conduct of the terminal, are not actionable nuisances, but are the necessary concomitants of its franchise."

Citing several cases, among others *Beseman v. P. R. R.*

Townsend v. Norfolk Ry. & Light Company, Supreme Court of Appeals of Virginia, January 8, 1906; on re-hearing February 23, 1906, 52 S. E., 970; 47 Am. & Eng. Ry. Cases, N. S., page 635.

This was an action of trespass by the owner of a lot with buildings and improvements thereon, situated on the west side of Cumberland Street in the City of Norfolk.

The defendant, the Railway Company, a Public Service Company, had erected on an adjoining lot machinery for the purpose of generating electric power, and, on justly operating this plant, large columns of smoke, dust, cinders, sparks and soot were hurled against and through the house of the plaintiff, making it untenantable, etc.

Special pleas and demurrers were filed.

The court below gave judgment in favor of the defendant, on the demurrer.

On appeal, the Court (Judge Keith), quotes from *Fisher v. Seaboard Air Line Ry. Co.*, 102 Va., 363; 46 S. E., 381; where it was said that:

"A railway company acting under authority of law, whose road is constructed and operated with judgment and caution, without negligence, is not liable to an adjacent land owner for damages resulting from noises, jarring and shaking of buildings, or dust and smoke incident to the running of trains, for no action lies for the loss or inconvenience resulting from doing an authorized act in an authorized way."

"To the authorities relied on in support of that case, many others may be added."

He then quotes approvingly from *Beseman v. Penna R R. Co.*, and then says:

"That railroad corporations, public service corporations, are, in many aspects, to be regarded as *quasi* public corporations, can be no longer doubted. Upon that theory their duties are measured and their rights determined.

"It would be easy to multiply authorities along this line. We shall not press this view of the case further, for counsel for plaintiffs in error state in their brief that they do not 'seriously contest' the doctrine enunciated by this Court in *Fisher v. Ry. Co.*'"

In *Georgia R. R. v. Maddox*, decided in 1902, 116 Ga., p. 64, 42 S. E., 315,

Twenty-four residents and owners of dwellings, and the trustees of two churches in the suburbs of the City of Atlanta, filed a petition to enjoin the Georgia Railway from creating a nuisance by the operation of a railroad terminal near their right of way. The location of the terminal and the operation of the road were under statutory authority.

An injunction was granted by the lower court. On an appeal, the judgment was reversed. The opinion, after discussing the various cases on the subject, concludes that there is very little disagreement in the decisions that a railroad company, operating on its right of way under statutory authority, can never be a nuisance, public or private, unless improperly operated. It refers to the *Beseman* case approvingly, saying, in substance, that it is founded upon the soundest reasoning, and that it is clearly distinguishable from cases like *Baltimore &c. R. R. v. Baptist Church*, 108 U. S., 317.

The courts of last resort in the following states have decided that damages which are incidental to the operation of a railroad on its right of way with care and skill, cannot be recovered by suit—many of them citing the *Beseman* case.

United States; *Northern Transp. Co. v. Chicago*, 99 U. S., 635;
Arkansas; *St. Louis I. M. & S. Ry. Co. v. Morris*, 35 Ark., 622;
Colorado; *Colorado Cent. R. R. Co. v. Mollandin*, 4 Colo., 154;

- D. of C.; *Neitzey v. B. & P. R. R. Co.*, 5
Mackey, 34;
Georgia; *Banking Co. v. Maddux* (above
cited);
Indiana; *Dwenger v. C. & G. T. Ry. Co.*,
98 Ind., 153;
Iowa; *Cook v. Chicago, M. & St. P. Ry.*,
83 Iowa, 278;
Kansas; *Atchison & N. R. Co. v. Garside*,
10 Kan., 552;
Kentucky; *Henderson Belt Co. v. De-
champ*, 95 Ky., 219;
Maine; *Whitney v. Maine C. R. Co.*, 69
Me., 208;
Michigan; *Grand Rapids Ry. Co. v.
Heisel*, 38 Mich., 262;
Minnesota; *Romer v. St. Paul City Ry.
Co.*, 75 Minn., 211;
Missouri; *Payne v. Kansas City St. J. &
C. B. Ry. Co.*, 112 Mo., 6;
New York; *Fobes v. Rome & O. R. Co.*,
121 N. Y., 505;
Ohio; *Parrot v. Cincinnati H. & D. R. Co.*,
10 Ohio St., 624;
Pennsylvania; *Penna. R. R. Co. v. Mar-
chant*, 119 Pa. St., 541;
New Hampshire; *Aldrich v. Cheshire*, 21
N. H., 359;
Tennessee; *R. R. Co. v. Bingham*, 87
Tenn., 522;
Vermont; *Hatch v. Vermont Cent. R. Co.*,
28 Vt., 142;
Wisconsin; *Hanlin v. Chicago & N. W.
Ry. Co.*, 61 Wis., 515.

In *Penna. R. R. v. Lippincott*, 116 Pa. St., 472, an action was brought by an owner of property abutting on a street, for damages from the noise, smoke and dust caused by the engines and cars in the operation of an elevated railroad constructed upon property owned by the railroad company in fee, lying on the opposite side of the street. It was held that the rule applicable to this case was that, except on proof of actual negligence, the alleged injury was not the subject of damage. And, in *Sparhawk v. Penna. R. R.*, 54 Penna. St. 401, it was held that the operation of a railroad alongside of a church, on Sunday, making no more noise or smoke than on other days in the week, furnished no ground for restraint in equity.

The appellant insists that the opinion of Justice Dixon in *Angell v. Penna. R.*, 14 Stew. Eq., 317, in 1886, is not in accord with this principle.

That case was decided in 1885 by Bird, *V. C.*, and on appeal affirmed in March Term, 1886, by the Court of Appeals.

The facts were, that the damages arose from the use by the defendant, of a street for station and terminal yard, in excess of its authority. The use of the street for these purposes was without authority of its charter. It was not part of its right of way.

Justice Dixon (page 229) says:

"These are strictly station and terminal purposes and, by providing for station yards, the legislature has indicated its intention that business of that nature should be transacted

there. Having a right of passage there, it used its tracks as though they were within its terminal yard, and so used them constantly in its everyday concerns. For this there is no legislative or municipal authority."

The Chief Justice, in his opinion in *Beseman v. Penna R.*, speaking of the *Angell* case in which he voted to affirm, described the acts of the Railroad Company complained of as [21 N. J. L. 241] "entirely unauthorized by its charter, and the case did not call for any expression of opinion on the part of the Court of Appeals, as to the effect of incidental damage done by the road in the necessary operation of its business," and says, "The case has no value as a precedent, beyond this."

And Justice Dixon, in a later case in the Court of Appeals, *Sayre Co. v. Newark*, 60 Eq., 362, above cited, says that the principle of law established by the *Beseman* case disposes of any question as to incidental damages from the operation of a railroad.

Appellant also insists that the experience in New York City, in what are known as the *Elevated Railroad* cases is an answer to the statement of the Chief Justice in the *Beseman* case, to the effect that if the railroad company were held responsible to one owner, it would be responsible to each person whose possessions are thus molested, and that it is questionable whether the running of railroads would be practicable if subjected to such responsibility.

But in the *Elevated Railroad* cases the fran-

chise happened to be of immense value, and the company was saved from ruin only because of that, and because the responsibility was confined entirely to owners of property fronting on the street in which the railroad was operated.

In *Taylor v. Seaboard Air Line Railroad*, above cited, in the Supreme Court of North Carolina, Judge Brown says:

"In the *Elevated Railroad* cases abutting property owners recovered permanent damages arising from smoke and noise, but upon the sole ground that the elevated structures invaded the owner's easement of light and air and greatly interfered with means of access to his property. Speaking of those cases, the Supreme Court of Georgia says: 'But in no case has the owner of property on a cross-street or a parallel street, no matter how close to the elevated road, been held entitled to recover so far as we have found; and yet it is almost certain, as a business proposition, that persons owning property abutting on cross-streets have found their property depreciated in value as a result of the construction and operation of the railroad.'

"*Austen v. Terminal Company*, 108 Ga., 687—the appellant's church was on a side street—the appellee was not on a street."

The only criticism of the *Beseman* case which we have found, is an extended subject note in Vol. 1, L. R. A., N. S., page 49-136. It is signed with the initials "P. H. V."

The editors of L. R. A. are Burdette A. Rich and Henry P. Varnum.

The appellant's brief is made up largely of quotations from this note.

On theory, P. H. V. reaches a different conclusion from Chief Justice Beasley in the *Beseman* case.

This subject note was published in March, 1905. Since that date the Supreme Court of Kansas, in *Atchison, Topeka & Santa Fe R. R. v. Armstrong*, above cited, the Supreme Court of North Carolina, in *Taylor v. Seaboard Air Line Ry.*, above cited; the Supreme Court of Appeals of Virginia, in *Townsend v. Norfolk Railroad*, above cited and the U. S. Circuit Court of Appeals for the Eastern District of Pennsylvania, in *Bunting v. Penna. R. R. Co.*, 189 Fed. Rep., 552, and in the case now before the court, have supported the conclusion reached by the Chief Justice in the *Beseman* case.

In the Supreme Court of Mississippi, in the case of *King v. The Vicksburg Railway & Light Company*, 6 L. R. A., N. S. page 1036, decided November 19th, 1906, that Court reaches a different conclusion.

The Constitution of the State of Mississippi was changed in 1890, and it is because of that change that the Court held that a right of action under such circumstances, exists.

This case was followed in the same court in the case of the *Alabama R. R. Co. v. King*, 22 L. R. A., N. S., 603.

III.

The courts of the United States will follow the settled decisions of the State courts as to rule of real property.

Suydam v. Williamson, 24 How., 427, 16 L. Ed., 744, was an action of ejectment, brought in the U. S. Court to test the validity of a deed made under certain Acts of the Legislature, as construed by the courts of New York. It appeared that the conclusion of the State Court with reference thereto was contrary to the opinion of the United States Court; and the Court said:

“The question is now presented to this court whether they should adhere to their own opinions as expressed in cases of 8 How., or acknowledge the authority of the courts of New York to finally settle the contest upon this title. The subject of the dispute is real property situate within the State of New York, and her laws exclusively govern in respect to the rights of the parties, etc.”

And, after discussing the exclusive right of every sovereign to command within its territory, quotes from a previous decision, *Jackson v. Chew*, 12 Wheat., 162:

“The inquiry is very much narrowed by applying the rule which has uniformly governed this Court, that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule will be applied by this Court that would be applied by the State tribunal.”

And, finding the settled opinion in the courts of New York, with reference thereto, although contrary to the former opinions of the United States Court, it enforced the conclusion of the State Court against its own, by reversing the contrary ruling of the Circuit Court.

This case has been often cited approvingly by the Supreme Court.

See Rose's Notes to

Vol. 16, L. Ed., page 73;

Davie v. Briggs, 97 U. S., 638;

Burgess v. Seligman, 107 U. S., 20;

City of Detroit v. Osborne, 135 U. S., 492.

Since this principle was established in *Beseman v. Penn. R. R.*, the railroad company has expended immense sums in the improvement of rights of way, without objection from adjacent owners.

The lands adjacent to the railroads have been bought and sold for a consideration based on this rule of property.

It would be an injustice to establish, at this late day, a different rule of property.

IV.

The courts of the United States have in no case adjudged that a railroad company is responsible for the incidental damages occasioned to lands by the operation of its trains on its right of way, in a manner authorized by its charter, with care and skill,

The appellant refers to three cases in the United States Courts

B. & P. R. R. Co. v. Fifth Baptist Church,
108 U. S., 317; already referred to,
and

Muhlker v. N. Y. & Harlem R. R., 197
U. S., 544; 49 L. Ed., 872.

Richards v. Washington Terminal Co.,
233 U. S. 546.

In none of these cases was the Railroad Company operating on its right of way—

The distinction between the rule of law with reference to damages to adjoining lands, resulting from the operation of a railroad on its right of way in the manner authorized by its charter, and the damages from its operation on lands not within its authorized right of way, was pointed out in the *Beseman* case and in many cases following the *Beseman* case, above quoted, and in *Atchison, Topeka & Santa Fe R. vs. Armstrong*, in 1 L. R. A., N. S., 113, above cited.

The Court said, in the *Fifth Baptist Church* case:

"The railroad company, in selecting a place for repair shops, acted altogether in its private capacity. Such location was a matter of indifference to the public. Consequently, with respect to such an act, the corporation stood on the footing of an individual and was entitled to no superior immunities."

In the *Muhlker* case the railroad was being operated in the street, and the question turned on the consideration of the deed to the city, of the strip of land to be used in trust for that street, by the grantor of plaintiff. Under the terms of this deed, the owner retained not only access to this street but the easement of light and air from the street.

The defendant, by consent of the State, built an elevated railroad longitudinally on the strip of land so deeded in trust for a street, cutting off the plaintiff's access and his easement.

The constitutional question involved was the impairment of the obligation of the deed by the grant to the railroad company from the State.

The case of the *Fifth Baptist Church* has been cited twice in the U. S. Supreme Court, in 137 U. S., 443, and in 137 U. S., 569. It has also been cited in the Federal Reporter as follows:

In

Consolidated Telephone Co. v. United Electric R. Co., 42 Fed. Rep., 281;

In

Chicago R. R. vs. Methodist Church, 102 Fed. Rep., 87;

In

- Tuttle v. Church*, 53 Fed. Rep., 426;
United States v. Luce, 141 Fed. Rep.,
418;
Stewart v. Wright, 147 Fed. Rep., 328;
Henderson v. Sullivan, 159 Fed. Rep., 49.

In almost all these cases attention is called to the fact that it is a precedent only where railroad companies are exercising a discretion in the location of their works off of their authorized right of way.

It is cited in the *Beseman* case, and in each of the cases in the State Courts above mentioned, as an authority in support of the rule of law that incidental damages resulting from the operation of the railroad on its right of way, however, injurious, are *damnum absque injuria*, unless negligence be established.

There are two features which clearly distinguish the case of *Richards vs. Washington Terminal Co.*, 233 U. S. 546, from the case at bar.

First, the *Richards* case arose in the District of Columbia, and was decided under Federal legislation and subject to the Fifth Amendment of the Federal Constitution. The conclusion of the Court is stated on the last page as follows:

“Construing the acts of Congress in the
“light of the Fifth Amendment, they do not
“authorize the imposition of so direct and
“peculiar and substantial a burden upon
“plaintiff’s property without compensation
“to him.”

In our case, the Fifth Amendment has no application as it is completely settled that it is a restraint only upon the powers of the Federal Government. (*Brown v. N. J.*, 175 U. S. 172, 174.) The result is that the Court has simply to decide whether under the New Jersey Law the plaintiff has a cause of action which justifies the relief prayed. Upon this question the Court would be governed by the decisions of the highest courts of the State, and these, in the present instance, seem quite conclusive.

In *State v. Erie R. R.*, 55 Vroom 661, the Court of Errors has again affirmed the principle of the Beseman case, and has further specifically declared the right of a railroad company to use soft coal.

In the second place, the plaintiff in the Richards case sustained a special and peculiar damage owing to the situation of his property with reference to the portal of the tunnel from which all the smoke emitted in the tunnel (or at least a great part of it) is poured upon the property of the plaintiff. The situation was as if surface water had been collected and discharged in a stream upon land of the plaintiff. If the tunnel had been an open cut so that the smoke would have been allowed to dissipate naturally, Richards would have been without remedy even though his property might have been seriously injured, for his damage would not have been special or peculiar.

Bunting v. Penna. R. R. Co., decided June 13th, 1911, 189 Fed. Rep., page 551, was an action at law to recover from the Pennsylvania Railroad Company, by an adjoining property owner, for

injuries to his property, by the alleged negligent operation by the defendant, through the emission of smoke from its engines.

John McPherson, sitting in the Circuit Court, E. D. Pennsylvania, on motion for new trial, said:

"The defendant (the Pennsylvania Railroad Company) has a franchise from the State that gives the right to emit whatever smoke may be necessary in carrying freight and passengers. The railroad is not authorized to exceed the necessities of its business. If it negligently emits smoke, it is undoubtedly liable to every person injured thereby, but it is not liable merely on the ground that injury has been done by the smoke from its engines; the smoke must also have been emitted negligently."

"It sometimes happens that a citizen may suffer injury that is not capable of redress. This is one of the consequences that occasionally result from living in a crowded community, under modern conditions.

"Whenever two rights conflict one of them must give way, and, in the absence of negligence, the defendant's right that is now in question is confessedly superior to the plaintiff's."

V.

No issue that appellee has so negligently operated its railroad as to injure the appellant.

This action was not based upon negligence.

There was no allegation in the bill of complaint that the acts of the appellee from which the injury resulted to the appellant, were negligently committed.

The appellant in its brief, on page 70, says:

“The allegations of the plaintiff’s bill of complaint that the acts of the defendant are unreasonable and unnecessary, do not charge that they are negligently done, as they may have been committed after the exercise of all the care and caution possible.”

There was no attempt on the part of the appellant to prove that the acts were negligently done.

In the brief, the appellant argues that upon cross-examination of the appellee’s witnesses negligence was shown.

That such cross-examination shows that the defendant was negligent in not adopting coke or anthracite coal, and in not so burning its bituminous coal as to prevent black smoke.

But that was not an issue which the appellee was called upon to meet.

There was no evidence which would justify the Court in finding that the defendant was negligent in not adopting coke or anthracite coal.

The opinion below deals with this phase of the case on pp. 464, 465 of the Record.

Judge McPherson, in the case of *Bunting v. Penna. R. R. Co.*, above referred to, in his charge said:

"It is said that by the use of a different kind of fuel in the operation of these locomotives the injury complained of could have been avoided, and some evidence has been offered to you on that subject. I shall not submit that question to you, because I do not think the evidence justifies me in so doing; and I may state my reasons briefly. Anybody using a machine is bound to exercise proper and ordinary care in that sort of work, and, as we all know, there are changes from time to time in machinery; improvements are devised and are put into use for the purpose of making them more efficient, and particularly for the purpose of making them more safe to those who use them. It is not the law that a man is bound to adopt at once any change that somebody else has made and which is said to be an improvement, nor even if it be any real improvement, because that, as you will see, would compel a whole industry to adopt at once what some person else had believed and adopted as an improvement upon previous methods. That is not the test. The test which experience and observation have found to be properly workable tests is the general and usual course of business. If a particular type of safeguard has been adopted throughout the business, that shows, etc., * * * If, I repeat, the general custom and usage in the operation of a railroad

should agree upon a particular device or a particular method of operation, that would present a different problem, and that we are not called to meet in the present case.

"There is evidence here with regard to two railroads in the country, or at least operations at two different points. In my judgment, that does not furnish evidence sufficient to justify me in submitting to you the question whether there has been negligence on the part of the defendant, company, in failing to use the kind of fuel upon which stress has been laid in the present case; I refer to the use of anthracite coal and the use of coke. Therefore you may lay that question aside from your determination."

There was no evidence to show any general custom and usage in the operation of railroads, to use either coke or anthracite coal.

There is evidence on cross-examination of appellee's witnesses, that the D. L. & W. Railroad used anthracite coal on its passenger trains; that the Central Railroad of N. J. at one time used on some of its passenger trains anthracite coal—both of those roads being what is known as anthracite coal roads. But no real attempt was made to show any common usage in that respect.

The appellee is authorized to use bituminous coal.

N. J. Laws of 1832, p. 96, Secs. 8-13.

In *Jersey City v. Abercrombie*, 58 Atl., 73 (not reported in the State Reports) the facts were that

the City had passed an ordinance to the effect that no engineer should allow any smoke to be discharged from any locomotive as the result of the use of soft coal.

Abercrombie, an officer of the Pennsylvania Railroad Company, was arrested on complaint of the city, for a violation of this ordinance and convicted in the First Criminal Court.

This conviction was removed to the Supreme Court for certiorari.

The conviction was set aside, the Court holding that:

"The Pennsylvania Railroad had the legal right to run its engines with the use of either hard or soft coal, so long as reasonable care is used and no unnecessary damage is done.

"It has acquired the right to use soft coal to operate this branch, by prescription.

"It has used soft coal in such operation for over thirty years."

One of the injuries in the *Beseman* case (50 N. J. L., p. 237) was because of the smoke from the engines.

In *Jenkins v. Penna. R. R.*, 67 N. J. L., 332, the use of soft coal by the defendant for the operation of its railroad in New Jersey, was assumed.

In *Bunting v. Penna. R. R. Co.*, above referred to, the use of bituminous coal for firing its engines by the appellee was sustained. The appellee proved that bituminous coal was the only coal by which it could practically or successfully operate its railroad.

That practically it is the only fuel by which the appellee can successfully operate its railroad.

VI.

An injunction will not be issued to restrain appellee from causing more smoke than authorized.

(a) Because the excess is denied by the appellee. It has never been established by a trial at law.

Pomeroy's Equitable Remedies, Vol. 1, Sec. 542, after stating that the same principle must govern the question as to the interference of the court, whether the case be one of public or private nuisance, says:

“If there is a substantial dispute as to fact or law, and the question is in doubt, a trial at law will be required before equity will intervene.”

(b) Because the appellee has for many years operated its railroad substantially as it does at present.

The evidence established that the appellee has been operating its trains in the same manner for many years. If occasionally a disobedient employee improperly fires his locomotive, and if then appellant's windows are open and the wind is from the south and appellant suffers annoyance, its remedy for such occasional injury is a suit at law, not an injunction.

There is no reported case in which courts of Equity have taken jurisdiction under like facts.

The appellee is authorized and practically compelled to burn coal.

Any injunction would necessarily result in punishing appellee because its employees disobeyed wilfully or carelessly its orders as to the firing of locomotive engines.

An injunction would result either in preventing the appellee from operating its railroad, or compelling it to hazard contempt of court through disobedient or careless employees.

The appellee cannot prevent improper firing.

It cannot prevent entirely the emission of smoke.

The complaint does not point in a specific manner to the time when or the place where the appellee made more noise or caused more smoke than it was authorized to make or cause.

Good pleading requires that this should be done with some reasonable degree of particularity.

Thomason case, 142 N. C., 322.

Damages, it is alleged, result from "noise and smoke which are unnecessary, avoidable and unreasonable" (p. 5, line 15). But when, or where, or how, or why is not alleged or proved with any certainty.

The testimony as to noise is that it is only the usual noise which is characteristic of railroad operations.

Rev. Kwiatoswki testifies (p. 129) as follows:

"Once a month or more I have to stop for a while, say three or four minutes."

Kanneys (p. 158) testifies as follows:

"When a train passes by it makes such a noise it disturbs the music and the service."

There is no proof as to any time or place when the smoke from a particular locomotive did any damage to the complainant.

The testimony on page 136, regarding Engine 966, referred to May 30th, 1911, and subsequent to that date, all after July 27th, 1911, the date of the filing of the bill.

The policeman, Boyle (p. 202), testified that on July 20th, 1910, he saw a locomotive moving a train of cars between Monmouth and Brunswick Streets, emitting black smoke. On all other occasions testified to by him, the locomotives were neither standing nor moving on that block.

There was no proof that the smoke of those engines annoyed complainant.

There is no evidence that the noise was unnecessary, unavoidable or unreasonable, or even unusual. On the contrary, the evidence was that they were the usual noises of the operation of a railroad.

The evidence that the black smoke was emitted was deficient in dates, in times and places. The appellant assumed that any black smoke that came from any part of the railroad from Bergen Cut to the Harsimus Cove, was a nuisance for which the appellees were responsible, and that jurisdiction in equity was established by proof that at times black smoke was emitted by the locomotives.

It was impossible for the appellee to specifically refute such loose statements. Such evidence does not have that certainty which entitles a court of equity to interfere by injunction.

The remedy for such alleged injuries is in a court of law.

(c) Because these occasional damages do not cause irreparable damage.

Pomeroy's Eq. Rem., Vol. 1, Sec. 542, says:

"The principle by which courts ought to be governed is, whether the extent of the damage and injury be such that the law will not afford an adequate remedy."

If one verdict be recovered in trespass for damages, the court must presume that such verdict would settle the litigation. A second verdict would be punitive.

Where the power of a court of law is sufficient to determine the controversy without any practical inconvenience, a court of equity will not take jurisdiction.

Bowen vs. Chase, 94 U. S., 812; 24 L. E., 184;

Smythe v. New Orleans Canal & Banking Co., 141 U. S., 648; 35 L. E., 891;
Whitehead v. Shattuck, 138 U. S., 146;
 34 L. E., 873.

(d) Because the answer set up a prescriptive right to operate its road as operated.

The issue thus formed is an issue not within the jurisdiction of the Court of Chancery.

In *Outcalt v. The Helme Company*, 42 N. J. Eq., 665, the bill averred that the defendant illegally maintained a dam by means of which back-water was thrown upon the complainant's mill-wheel

above; and prayed an injunction against such maintenance.

The answer set up a prescriptive right to maintain the dam as it was, and denied that the dam was the cause of the interference with complainant's wheel.

Held: That the issues thus presented were not within the jurisdiction of the Court of Chancery; and also

Held:

"When the propriety of instituting a suit in equity depends upon the complainant's right having been established at law, and the bill is filed before that right has been so settled, and there will be no necessity for further relief in equity, if the defendant shall conform to the rights which the judgment of law may establish against him, then the bill should not ordinarily be retained, pending the legal litigation."

(e) Because of laches on the part of appellant, in two respects.

1st. Because of the acquisition of the land and the erection of buildings thereon from time to time after the nuisance was known to them.

2d. The failure to bring suit or in any way to object to the alleged trespass for over twenty years.

Injunctive relief will only be granted when application therefore is seasonably made.

Midland R. Co. v. Smith, 113 Ind., 233;
15 N. E., 256;

Patterson Horse R. Co. v. Paterson, 24
N. J. Eq., 158;
B. & O. R. R. Co. v. Strauss, 37 Md., 237;
Planet Property v. St. Louis R. Co., 115
Mo., 613;
Hinnerhitz v. United Traction Co., 205
Pa., 91.

In December, 1884, when the appellant made its first purchase, the railway company had been operating for eleven years, substantially as at present, on an elevated trestle, in open view. Subsequently it constructed, at great expense, in place of the trestle, a solid embankment, one hundred feet in width and many hundred feet in length, within a stone wall, eighteen feet above the surface of the street and laid thereon its tracks (Gardner, p. 282), and continued, on that elevation, to operate its railroad in the same way to the present time. The appellant stood by for over twenty-one years without objecting to this use. During all that time the appellee continued to transact its business substantially in the same way.

Under such facts, the appellant is not entitled to relief by injunction.

When a nuisance had existed for six years before any proceedings to restrain it, an injunction was refused and the party left to his remedy at law.

Gaunt v. Fynney, L. R. 8, Ch. App. 8.

VII.

Jurisdiction cannot be maintained on the ground of multiplicity of suits because the alleged trespasses are between two persons only.

In *Jerome v. Ross*, 7 Johns. Ch., 315, 11 Am. Dec., 484, Chancellor Kent states the rule with reference to injunctions for multiplicity of suits, in the following language:

“A Court of Equity will sometimes interfere to prevent a multiplicity of suits by a bill of peace. The principal is stated in *Tenham v. Herbert*, 2 Atk., 483, and in *Elridge v. Hill*, 2 Johns. Ch., 281; but that is only in cases where the right is controverted by numerous persons, each standing on his own pretensions; and it has no application to the case of one or more persons choosing to persevere in acts of trespass in despite of suits and recoveries against them.”

Chancellor Kent states the rule without exception, but some cases have recognized one exception, and that is where the rights of the complainant have been established by an action at law. Then equity may interfere to prevent a repetition of trespass, although committed or threatened by only one person.

Halsey v. Rapid Transit Street R. R. Co.,
47 N. J. E., 380;
Citizens' Coach Co. v. Camden Horse R. Co., 29 N. J. Eq., 299.

The cases where equity will enjoin to prevent a multiplicity of suits between two persons only, however, are where the whole controversy arises out of the same matter and has been settled at law, and further litigation which seems purely vexatious is proceeded in.

Imperial Ins. Co. v. Gunning, 81 Ill., 236;
Kirwin v. Murphy, 189 U. S., 54; 47 L. Ed., 705;
Hale v. Allison, 188 U. S., 56; 47 L. Ed., 387;
Cruikshank v. Bidwell, 176 U. S., 73; 44 L. Ed., 377.

The decree below should be affirmed.

Respectfully submitted,

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Office Supreme Court, U. S.
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No. 269.

October Term, 1914.

IN THE

Supreme Court of the United States.

THE ROMAN CATHOLIC CHURCH OF
SAINT ANTHONY OF PADUA, JER-
SEY CITY,

Appellant,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY.

Appeal from the United States Circuit
Court of Appeals for the Third District.

Brief for Appellant.

MARSHALL VAN WINKLE,
Attorney for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1913. No. 739.

THE ROMAN CATHOLIC CHURCH OF
ST. ANTHONY OF PADUA,

Complainant and Appellant,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,

Defendant and Appellee.

In Equity.

APPEAL FROM CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Complainant and Appellant.

STATEMENT OF FACTS.

1. The complainant is a religious corporation, and is engaged in such work upon the lands and premises owned by it and described in the bill.

2. The defendant is a corporation, and as such, maintains and operates a railroad south of Sixth street, in Jersey City, Hudson County, New Jersey.

3. On December 20th, 1884, the complainant became the owner of three lots in Jersey City, fronting on the westerly side of Monmouth street, and erected thereon a church, and in 1896 constructed an addition thereto at a cost of \$50,000.00, and has since occupied the same.

4. On May 10th, 1893, it became the owner of a lot on Sixth street, near Monmouth street, and erected thereon a residence for the priest attached to the said church.

5. On June 11th, 1898, it became the owner of four other lots on Sixth street, and erected thereon a school building, costing \$72,000 exclusive of the

land, and has used the same ever since as a school for upwards of eleven hundred children.

6. On August 11th, 1902, it became the owner of a lot of land on the northerly side of Sixth street, and erected thereon an addition to the said residence of the officiating priest, at a cost of \$25,000 to \$26,000.

7. On March 20th, 1905, it became the owner of a lot on the southerly side of Seventh street, and erected thereon a home for the sisters and female teachers connected with the said school, and it has been occupied as such ever since.

8. That the complainant's said structures are of substantial construction and, except for the acts of the defendant are adapted to their respective purposes; and that the immediate neighborhood thereof is thickly populated and is exclusively a residential district.

9. That the defendant, in the operation of its railroad, maintained up to 1901 and operated south of said Sixth street and immediately to the south of the lands of the plaintiff, a line of railroad *consisting of two tracks upon which it operated a number of freight trains, but which was increased to eight tracks in 1901*, and since which time trains, cars, switch engines and locomotives, continuously, at all hours of the day or night, have passed upon said tracks, the lands, premises and structures of the complainant, and which locomotives since 1902 have burned, and are now burning, continuously vast quantities of soft bituminous coal, and from the burning and partial combustion of which there arises, and continuously since 1902 has arisen, dense volumes of black smoke, soot, cinders, ashes, noxious and unwholesome gases, offensive odors and vapors, which are carried into, upon and through structures and premises of the complainant, seriously injuring the buildings and their use for the purposes aforesaid; and

that the operation of the trains and engines has been attended with noises sufficient in extent to interrupt the services in the church—the teaching in the school—and conversation and sleep in the rectory.

10. That the use of the defendant's tracks opposite to the complainants is, and has been practically that of a freight yard and terminal; being used almost exclusively for the making up and switching of the freight trains, many of which stand for long periods of time opposite complainant's property, during which time exhaust steam is blown off and dense black smoke emitted from the engines.

11. The acts of the defendant have taken from the complainant property consisting of the easement of light and air, without due process of law and without compensation, and is a violation of the provision of the Constitution of the United States.

12. That the said acts of the defendant are a nuisance and one of special injury to the complainant and are avoidable and unreasonable and not necessarily connected with the construction or a reasonable and careful operation of the railroad.

13. That the said acts of the defendant are continuous and will cause great and irreparable loss to the plaintiff and subject it to the prosecution of a multiplicity of suits for damages, unless the defendant be restrained therefrom by injunction.

I.

A railroad corporation has no more right than an individual to so use its property as to unreasonably interfere with others, without making compensation.

In Chicago C. W. Ry. C. vs. First Methodist Episcopal Church, 102 Fed. Rep., 85, the Court held: "*A railroad company has no more right than*

"an individual to so use its property as to unreasonably interfere with the peaceable and comfortable enjoyment by others of their property or to cause special injury to particular property without making compensation for the injury. There is no such thing as a natural person or a private corporation having a 'lawful right' to invade the premises of an abutting owner and appropriate his property; there is no difference in principle between an actual physical invasion of one's property, and the creation and maintenance of a nuisance which has the effect to deprive him of his beneficial use. The abutting owners of property on a public street have as good a right to the free enjoyment of the easement of light and air as they have to their property itself. Without the free enjoyment of these easements they could have no beneficial use of their property. And it is well settled that filling the air with smoke, cinders and offensive odors materially injures the easement of light and air, to the free enjoyment of which abutting owners of property upon a street have a legal right and constitute in legal effect a taking of property. The defendant can no more escape making compensation for such damages than it can appropriate the plaintiff's church to its own use without making compensation therefor." Affirmed 42 U. S. Circuit Court of Appeals, 178.

In Muhlker vs. Harlem Railroad Company, 197 U. S., 544, 563, the Court held:

"It is impossible for us to conceive of a city without streets or any benefit in streets, if the property abutting on them has not attached to it, as an essential and inviolable part, easements of light and air as well as of access.

"There is something of a mockery to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff

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ught? Because he can cross the railroad at
re places on the street, the State, it is contended,
authorize dirt, cinders, smoke from two hun-
d trains a day to be poured into the upper win-
os of his house.

(*Am. 1863*)

In *Barnett vs. Johnson*, 15 N.J. Eq., 481, there is
clear expression of the right of abutting owners
light and air, and of the common practice and
use of the world upon which it is founded. "It
is right," the Court said, "founded in such an
urgent necessity, that all laws and legal proceed-
s take it for granted. A right so strong
that it protects itself, so urgent that upon any
attempt to annul or infringe it, it would sit at
opposite all Legislature enactment and all judicial
decision." And graphically describing the right
reserved further, "is not every window and every
door, in every house, in every city, town and
village, the assertion and maintenance of this
right? * * * The permission or command of
State can give no power to invade the private
rights, even for a public purpose without payment
of compensation—and payment of such compensation,
when necessary, to the performance of the duties of
railroad company, may be as all have already ob-
served, part of its submission to the command of the
State. * * * We are not called upon to dis-
cuss the power or the limitations upon the power
of the Courts of New York, to declare rules of
property or change or modify its decisions, but
only to decide that such power cannot be exercised to
take away rights which have been acquired by con-
tract, and have come under the protection of the Con-
stitution of the United States. * * * We certainly
can estimate the difference between a building
with full access of light and air, and one with
those elements impaired and polluted. We need
only add that the right of passage is not all there

"is to a street, and to call it the primary right is "more or less delusive. It is the more conspicuous "right, has the importance and assertion of commu- "nity interest and ownership property has a certain "dominance, but it is not more necessary to the "making of a city than the rights of light and air, "held, though the latter are, in individual owner- "ship and asserted only as a right of private prop- "erty. The true relation and subordination of those "rights, public and private, is expressed not only "by the elevated railroad cases but by other cases. "They are collected in 1 Lewis Eminent Domain, "Sec. 91, and it is there said, "established beyond "question the existence of those rights or easements "of light, air and access as appurtenant to abutting "lots, and that they are as much property as the "lots themselves."

~~"A railroad company cannot be justified in an in-
jury to private property any more than a private
individual, unless the act causing the injury was
done as the agent or in behalf of the government
and in effect an object of public interest.~~

"In the construction and use of their railroad "they are not acting in the capacity of public "agents, but as a corporation pursuing their own "interests in the mode warranted by their charter; "and if in the lawful exercise of this power they in- "flict an injury upon the private rights of others, "they must respond in damages for such injury; but "such an injury, however, must be the natural and "direct cause of the act itself and not a conse- "quence which results from the fears, prejudices, "passions or caprices of the public." B. & S. A. T. R. vs. Camden & A. R. & T. Co., 17 N. J. Law, 314. (³¹⁰ 319)

In Penn. R. R. Co. vs. Angel, 41 N. J. Eq., 316, 318, 319, the Court held: "*The defendant has the same right to the enjoyment of its franchise that an*

"individual has—no more or no less. The same principles that govern the courts when soap-boilers, tallow chandlers or the owners of slaughter houses, brick kilns, tanneries and the like, are complained of must govern where corporations are complained of. I cannot conceive the right of one person or class committing an act which worketh hurt and injury to another with impunity to the transgressor whilst in the case of another person or class such act would either be promptly restrained or punished." And at p. 327, says: "*The defendant's justification was rested at the argument upon the ground that the Legislature and the Common Council of Camden had authorized the defendant to use Bridge avenue for its business and that its business requires such use as the defendant has hitherto made, and therefor the use cannot be, in a legal sense, injurious,*" and at page 329 Judge Dixon says: "An act of Legislature cannot confer upon individuals or private corporations acting primarily for their own profit, although for public benefit as well, any right to deprive persons of their ordinary enjoyment of their property except upon condition that just compensation be first made to the owners. This principle rests upon the express terms of the Constitution." In declaring that private property shall not be taken without recompense, that instrument secures to owners not only the possession of property but also those rights which render possession valuable. Whether you flood the farmer's field so that it cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noises so that it cannot be occupied in comfort, you equally take away the owner's property. In neither case has the owner any less of material things than he had before, but in such case the utility of his property has been impaired by a direct invasion of the bounds of his

"private dominion. This is the taking of his property in a constitutional sense; of course mere statutory authority will not avail for such an interference with private property. This doctrine has been frequently enforced in our Courts." In Trenton Water Power Co. vs. Raff, 7 Vr., 335, Mr. Justice Dupue said: "The destruction of private property, either total, partial, or the diminution of its value by an act of the government, either directly or indirectly, and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of constitutional provision."

"The injuries to which immunity, from responsibility attaches are such only as arise incidentally from acts done under a valid act of the Legislature, in the execution of a public trust for the public benefit by persons acting with due skill and caution with the scope of their authority. If the injury be direct, or the work be done for the benefit of an individual or corporation, with private capital and for private emolument, the principle which absolves the parties from liability to action at the suit of persons injured does not apply even though the public be incidentally beneficial by improvement.

"That the railroad shall be so constructed and operated is required by the unanimous consent of the community, and the annoyance thence unavoidably arising are not of sufficient importance to be regarded as invasions of those rights of property which society recognizes and protects.

"They must be classed, rather among these limitations which the social state imposes upon the enjoyment of private property for the common good. But if, in any case, these annoyances become so great as to destroy or substantially impair the legitimate use of private property the person injured becomes entitled to redress. Even the common good must yield to private right."

"It is conceded that a railroad corporation is a private corporation though its uses are public." Georgia R. & Bng. Co. vs. Smith, 128 U. S., 174-182.

In Alabama & Vicksburg Railway Co. vs. King, 22 L. R. A. N. S., p. 603, the Court said: This case is very largely controlled by the principles announced in the case of King vs. Vicksburg R. & Co., 88 Miss., 456; 6 L. R. A. (N. S.), 1036. *That case, among others, settled the proposition that "a corporation cannot claim exemption from liability for a nuisance maintained by it in the operation of an electric railway power plant, whereby private property is damaged, because it is operating under a charter giving the right to do the business."* That proposition, and indeed, the whole question involved in these two cases, is set forth with most masterly and profound ability in the exhaustive note to Louisville & N. Terminal Co. vs. Lellyett, 1 L. R. A. (N. S.) 49 et seq. It is said in that note, on page 50, that the correct doctrine is best stated in the opinion of the Court in Blanc vs. Murray, 36 La. Ann., 163; 51 Am. Rep., 9, as follows: *"That which is authorized by the Legislature within the strict scope of its constitutional power cannot be a public nuisance, but it may be a private nuisance; but the legislative grant is no protection against a private action for damages resulting therefrom. After approving this doctrine, the Court further said: "The doctrine sometimes stated in the elementary works, and which has been held by some Court that whatever is authorized by a Legislature cannot be a nuisance of any kind, is exploded."*

To this statement of the law is appended a citation of well selected authorities, very numerous, and decisive of the proposition stated."

"In the note above referred to in 1 L. R. A. (N. S.) a p. 60, it is said:"

"The question as to the effect of a legislative charter has arisen most frequently in cases of railroads, and therefore, to get the problem well in mind, the situation with respect to them will be examined. An individual may run a railroad on his own property without being liable for a nuisance to his neighbors, so long as, under the circumstances, it constitutes a reasonable use of the property and comes within the maxim *sic utere tuo ut alienum non laedas*. If however the enterprise is too large for him to handle alone, and he decided to organize a corporation for that purpose, it is necessary for him to receive the sanction of the State by means of a charter, in order to secure the advantages which incorporation confers. But so far as the running of the railroad is concerned, he is in precisely the same condition that he was in before. He now has authority to become an artificial being, and that being has authority to run a railroad; but it must still do it with full regard to the rights of other property holders. If, in addition, he desired to extend his road onto another's property or along a public street, he can secure the right of eminent domain by undertaking to become a public servant; but the authority so given him does not change his relations to his fellow citizens, except so far as he can compel them to surrender their property to him for due compensation. In other words his charter and right of eminent domain have merely guaranteed the right to prosecute the enterprise, but have not relieved him of the duties as to making compensation which should rest upon him in their absence. The charter authority prevents the enterprises from being a public nuisance, but has no bearing on the question of presence or absence of a nuisance which is strictly private."

"In Georgia R. & Bkg. Co. vs. Maddox, 116 Ga., '64, was announced the further very correct opinion, that the fact that the railroad was constructed before the private citizen built his house in no wise interferes with the private citizen's right to recover damages due to a private nuisance caused by a railroad company. The Court said further: "The contention of the defendants in error that this terminal yard of switches and side tracks is a nuisance * * * because dwellings were erected there before the construction of the yard, and it could have been located at another point, where there were no residences, without being a nuisance to any one, 22 L. R. A. (N. S.) is without modern legal precedent to sustain it, and is unsound for at least two reasons: In the first place, the terminal yard was located at the terminus of one railroad, on an existing right of way of another railroad, and under statutory power. In the second place, it is obvious, if the terminal yard is a nuisance because located near dwellings, even in the woods or a field, as soon as the owners of the adjacent land built houses on their own land: for the old rule maintained by some authorities, that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded." This announcement that the old rule maintained by some authorities that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded, is a most wholesome announcement to which we heartily subscribe. See also King vs. Morris & E. R. Co., N. J. Eq., 297. It is also announced in the note referred to in 1 L. R. A. (N. S.), at page 84, that the principle so often invoked by railroad companies and other corporations in this class of cases, that what the Legislature authorized can never be unlawful, means

"always, only that that principle is limited to lawful authorization by the Legislature, and the Legislature has no power to destroy private property by authorizing the erection of a private nuisance in its vicinity." The Legislature cannot now, any more than the King could in the past, shelter under the absurd pretense that 'the King and the Legislature can do no wrong.' 1 Lawyers' Reports, annotated, N. S., p. 84."

"In 5 Barb., 79, in the case of First Baptist Church vs. Schenectady & T. R. Co., the Court said that the defendant was indeed authorized to make the railroad and to acquire the land necessary for the purpose; that it was also authorized to use the road for the transportation of passengers and freight, but that, in the exercise of this authority, it was only to be exempt from liability for injuries to others to the same extent as if the railroad had been constructed and used by individuals, owning the land without the legislative sanction; that if either in the construction or use of the road it committed an act for which an individual, under the same circumstances, would be liable, it, too, must be answerable for the consequences; that every corporation takes its powers subject to this implied restriction, and any other doctrine would lead to unimaginable mischiefs; and that there, as in this country, corporations are so multiplied and so extensively engaged in various departments of business to hold that they may with impunity do any act for which an individual would be amendable to justice would result in the most pernicious consequences."

"The argument, ab inconvenienti, made so often in cases of this kind by railroad companies or other corporations that, if it should be held responsible for damages flowing from a private nuisance created by it to one owner, it would be so responsible

"to every other owner, and consequently would be ruined, is very neatly disposed of by the author of the note above, in the following language: The futility of the reasoning to the effect that the plaintiff should not have this action because every land-owner on each side of the track would be entitled to his action, and the litigants would be numbered by thousands, and that it was unquestionable whether the running of railroads would be practicable if subjected to such a responsibility is plainly apparent. As is stated elsewhere, the experience in New York City, in what are known as the Elevated Railroad cases, is a perfect answer to any such shop logic as this. *The effect of the decisions in those cases was to compel the elevated roads to pay to each and every owner of property on the streets on which the roads were located in a thickly settled city—the metropolis of the Western Hemisphere—for a distance of miles in extent, compensation for the damage to his property by the construction and operation of the road. Notwithstanding all which the roads are still running and have increased in number, and all are paying extensive profits to their stockholders.* (1 L. R. A. (N. S.), 103 Note)." "The last case which we propose to cite as establishing this proposition and which states it with the very greatest clearness, is the case of *Blanc vs. Murray*, 36 La. Ann. 165, 51, Am. Rep., 9, in which that Court held that which was authorized by the Legislature within the scope of its constitutional power, could not be a public nuisance, but that it may be a private nuisance, and that the legislative grant was no protection against a private action for damages resulting therefrom, and that the doctrine sometimes stated in the elementary works, and which had been held by some courts, that whatever was authorized by the Legislature could not be a nuisance of any

"kind, was an exploded doctrine. Indeed, we held "through Campbell, Special Judge, in the case of "the same party in 88 Miss., 456, 6 L. R. A. (N. "S.), 1036, 117 Am. St. Rep., 749, 42 So., 204, "above referred to, that if the Legislature were to "attempt to pass a statute exempting the railroad or "other corporations from liability for damages for a "private nuisance created by it, such act would be "unconstitutional."

"We think it must be settled beyond any controversy by these authorities, that whatever exemption the railroad company had under its charter and statutes amendatory thereof from liability for any public nuisance, it certainly was liable to this plaintiff for the damages caused here by this private nuisance. In fact, the property of the plaintiff was practically destroyed. There was as was well said in the opinion in 88 Miss., 456, 6 L. R. A. (N. S.), 1036, a physical invasion and destruction of her property, so that it could no longer be used as a home. As once before remarked in this opinion, the appellant abandoned any claim that allowing the plaintiff to recover damages caused by this private nuisance would impair any contract obligation it had, only insists here that to allow the plaintiff so to recover, would be to take its property without due process of law. But it must be too obvious for further comment that, since an action for damages caused by this private nuisance is a right inherent in the plaintiff in such cases, under the maxim *sic utere tuo ut alienum non laedas*, there could not possibly, in any legal or logical sense, be said to be any deprivation of property without due process of law in doing what the law authorizes. Alabama & V. R. Co. vs. King, 22 L. R. A., N. S., 603.

"Where a railroad company acquires land for terminal purposes in the heart of a city it cannot use

*"such land in disregard of the comfort and property
of others."*

*"It must adjust its operation so as to produce the
least annoyance possible."*

"Ridge vs. Pa. R. R. Co., 58 N. J. Eq., 172. (Feb'y, 1879)

Any different operation would be negligence.

The acts of the defendant constitute the taking of private property without compensation. This question was decided in *Muhlker vs. N. Y., & H. R. Co.*, 197 U. S., pp. 544-571. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is more necessary to the making of a city, than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed not only by the Elevated railroad cases, but by other cases. They are collected in *Lewis, Eminent Domain*, P. 91 e, and, it is there said, "established beyond question the existence of these rights, or easements of light and air, and access as appurtenant to abutting lots and that they are as much property as the lots themselves."

"To take or impair these is to take the right of exclusion. Logically there is a partial taking of the lot, as much as is one corner was cut off and the same rule of compensation may be applied."

Lewis on Eminent Domain, p. 204.

"Destruction of private property, either total or partial, or the diminution of its value by an act of the government directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of the constitutional provision." *Trenton Water Power Co. vs. Ruff*, 36 N. J. Law, 335 (Nov., 1873). "*Private property cannot be taken without compensation even in the absence of a constitutional prohibition.*" *Sinnicksen vs. Johnsons*, 17 N. J. Law, 129-145 (May, 1839). See also *Barrett vs. Johnson*, 15 N. J. Eq., 481 (Nov., 1863). See also *Richards vs. Washington Terminal Co.*, U. S.

"In legal effect the nuisance resulting from the use made of these structures by the defendant constituted a partial taking of the property of plaintiff, for which compensation must be made."

Sedgwick on Const. Law, 2d edition, p. 262-3.

"To hold that if the government refrains from the absolute conversion of said property to the use of the public, it can destroy its value entirely, can inflict irreparable injury and, because in the narrowest sense of the word, it is not taken, would prevent the constitutional provision." *Ibid.*

"To effectively impair the usefulness of property is a taking within the meaning of the constitution."

Pumelly vs. Green Bay Co., 80 U. S., 166, 167.

"To take away the essential use of property, is to take the property itself, and to do this is beyond the power even of sovereignty, except by a proper proceeding to that end."

Cartin vs. Benson, 222 U. S., 78.

"Rights as regard real property, to light and air, to be undisturbed by nuisance by the unreasonable use of neighboring property, are rights wherever they exist, and to the extent to which they are secured by law, are part and parcel of the owner's property in land." Lewis on Eminent Domain, 2d Ed., Sec. 54, p. 56. "Whenever the lawful rights of an individual in the possession, use or enjoyment of his land are in any way abridged or destroyed by reason of the exercise of the power of eminent domain, his property is *pro tanto* taken and he is entitled to compensation." *Ibid.*, Sec. 56, p. 58. "Thus, if the city takes a lot adjacent to my own and under proper authority erects works thereon the operation of which necessarily fills my premises with noxious

gases whereby my land is depreciated in value, I am entitled to compensation." *Ibid*, p. 59. "If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove in point of fact that the owner is deprived of property, though a particular piece of property may not be actually taken." *Ibid*, Sec. 57, p. 61. *Sedgwick on Const. Law*, 2nd Ed., p. 462-463.

If the acts of the defendant with their resulting effects, constitute a taking of private property without compensation, then it can make not one particle difference if the acts were committed by the defendant while operating upon the public street or upon its private property immediately on the opposite side of the public street adjoining plaintiff's property. At what particular locality the acts are committed which constitute a taking of private property without compensation, cannot affect the question of liability for damages and an injunction. Whether on the private property of the railroad company or upon the public street makes no difference.

If the acts of the defendant constitute a taking of private property without compensation, it seems to us absurd to hold that the defendant can continue to take private property without compensation so long as they can show that it does not do so through negligence—and so long as they continue to exercise care the plaintiff is without relief. If they can take private property without compensation, provided they do not do so negligently, would be placing a construction upon the Federal Constitution which will be a novelty, to say the least. See 80 U. S., pages 166 and 167, and 222 U. S., 78.

"The depreciation in the value of land lying along the highway, due to the construction of a railroad next to the highway on the opposite side thereof,

gives the owner a right to compensation, under a constitutional provision that private property shall not be taken "or damaged" without just compensation. *Lake Erie & W. R. Co. v. Scott*, 8 L. R. A., 330, 132 Ill., 439."

"Taking cannot be limited to the absolute conversion of real property to the use of the public, so as not to incline cases where the value is destroyed by irreparable and permanent injury inflicted on it." *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S., 13 Wall., 166, (20:557); *Foster v. Stafford Nat. Bank*, 57 Vt., 128; *Wilmes v. Minneapolis*, 2 N. W. R. Co., 29 Minn., 243; *Mills Em. Dom.*, p. 119, 30.

"It includes not only the appropriation of the land, but also the direct consequences of such appropriation. *Hamilton County v. Garrett*, 62 Tex., 602."

"A partial destruction or diminution in value is a taking." *Glover v. Powell*, 10 N. J. Eq., 211.

"A deposit of stone, rubbish, sand or other material upon land, is such a taking as to require compensation." *East Pennsylvania R. Co. v. Schollenberger*, 54 Pa., 144.

"Whenever the exercise of the right operates to "destroy an easement incident to real property or "amounts to an actual physical invasion of property "by some agency that produces injury thereto—or "imposes a burden thereon this is a taking of property. *There need not be an exclusive appropriation, "of the property, but such an interference with the "beneficial use thereof as operates an essential abridgement of the owners rights incident to, and an essential "part of the estate.*

"There can be no question that the erection of "gas works or the setting up of any other noxious "trade in the vicinity of any premises that emits "noxious odors, which are sent over my lands in

"quantity and volume sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life so as to constitute a legal nuisance, is a taking of my property as the Legislature may not permit without compensation. What possible distinction can there be between the actual taking of my property, or a part of it and occupying it for the erection of a railroad track or a gas house, and invading it by an agency that operates as an actual abridgement of its beneficial use and possibly a complete and practical ouster. There certainly can be none. By the erection of such works a burden is imposed upon my property; the property itself is actually invaded by an invisible, yet a pernicious agency, that seriously impairs its use and enjoyment as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water; it is an incident to the land annexed to and a part of it and is sacred as my right to the land itself. Therefore, I apprehend that the Legislature has no power to shield one from liability for all the consequence of the exercise of an occupation that produces such results, any more than it has to authorize the flooding of my land or the permanent diversion of a stream."

Wood on Nuisance, Sec. 762, p. 1093, and cases cited.

In the case of Beach vs. S. I. Z. Co., 54 N. J. Eq., 65 (affirmed 55 N. J. Eq., 824), the Court held that maintenance of a nuisance to real estate amounts to a taking of private property and cannot be legalized by the Legislature even upon terms of compensation."

"Where the right of the claimant is clear and the facts undisputed a Court of Equity is bound to give preventative relief. To refuse is to allow the defendant to take complainants' property upon terms of paying such compensation from time to time as the jury may assess."

"It was suggested that in this case no injunction should be ordered, but that the complainants should be left to their action at law for damages. I am unable to adapt that view. It must be considered as settled law in this State that the maintenance of a nuisance of the kind here in question is, in effect, a taking of property." (Penn. R. R. Co. vs. Angel, 14 Stew. Eq., 316-329.) Where Judge Dixon, speaking for the Court of Errors and Appeals, says:

"This principle rests upon the express terms of the Constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields, so that they cannot be cultivated, or pollute the bleacher's stream, so that his fabrics are stained, or fill one's dwelling with smells and noises, so that it cannot be occupied in comfort, you equally take away the owner's property."

"In neither instance has the owner any less of material things that he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion; this is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property."

By the foregoing it appears that the highest Court of the State of New Jersey has construed its Constitution and held in terms that the acts of the defendant constitute a taking of private property without compensation, and this Court in Osborn vs. N. P. Ry. Co., 147 U. S., 258, held: "As a general rule, this Court follows the decisions of the highest tribunals of a State upon the

III.

The case of Beseman vs. Penn. R. R. Co., 50 N. J.

L., 235, is not an authority to be followed. and was not decided by the highest court of the State

The decision in *Beseman v. Penn. R. R. Co.*, was upon a demurrer to a plea setting up among other things that the defendant had a right to do as it was doing, and which lawful acts were the supposed grievances of which the plaintiff complained and which demurrer admitted the truth of the facts set forth in the plea.

The defendant relies, to a great extent, upon this case. The suit was for damages alleged to have been done to the house and lands of the plaintiff by the running of the defendant's trains. This case is not the law as settled by the decisions of the Federal Courts, and it is questionable if it is or ever was the law in the State Courts of New Jersey. The case was decided by the N. J. Supreme Court, February Term, 1888. The Court was composed of four Judges, Justices Beasley, Scudder, Dixon and Reed, one of whom, Judge Dixon, dissented from the decision. In that case the Court, in substance, held that a railroad company is not responsible for damages incident to the operation of the railroad, the land abutting on or near to the track, provided the road was run in all respects with care and skill. In other words, in order to defeat a claim on an abutting property owner for damages, no matter how great, all that is necessary for the railroad company to show is that it operated its road with care and skill, and that it did not negligently cause the damage. This case holds that a railroad company can damage private property to an extent to constitute a taking of it provided it does so with care and skill. If this is, or ever has been, the law, it is about time that it was more generally understood.

It appears that this case has been twice examined by the Court of Errors and Appeals. It was first repudiated in the case of Penn. R. R. Co. vs. Thompson, 45 N. J. Eq., 870 (June 1889), in which the Court held directly contrary to the ruling in the Beseman, holding that: "Where the acts "of a railroad company, in drilling its cars, "&c., amount to a legal nuisance to the "owner and occupants of a dwelling house adjacent "to the track complained of, it cannot defend and "justify such acts on the ground of necessity and ad- "verse user, if the particular track whereon such "drilling is done has been laid less than twenty years, "although its other and adjoining tracks have been "laid and used more than twenty years. The com- "plaint in this case is, that the defendant "so manages the engines, cars and trains on its "road, opposite the dwelling house of the com- "plainant, in the City of Camden, as to create "a nuisance to the complainant. The allegations "in the bill are so similar to, and the testimony so "nearly corresponds with the testimony in the case "of Pa. R. R. Co. vs. Angel, 14 Stew. Eq., 316, "that I shall be content with calling attention to "that case. In that case the Court of Appeals de- "cided that acts similar to the ones established in "this case amounted to a nuisance. And so far as "the questions raised in this case are similar to the "questions raised and decided in that, as I under- "stand the counsel for the defendant, he does not "expect me to disregard the law as laid down in "that case. It is true that counsel called my at- "tention to the case of Beseman v. Penn. R. R. Co., "21 Vr., 235; and the counsel claims that the Su- "preme Court decided in favor of the company, "and that the facts on which the judgment was "based were in all respects similar to the facts in

"this case. But unless the questions now before
"me are quite distinguishable from the Angel case
"I shall not be justified in departing from the rule
"there laid down."

This case (Penn. R. R. Co. vs. Thompson), was decided by the Court of Errors and Appeals, and which Court was unanimous in its decision, and was composed of sixteen Judges, including Judges Beasley, Scudder, Dixon and Reed, the identical Judges who had sixteen months previously (February, 1888) decided the Beseman case. And in which Thompson decision these Judges concur with the other thirteen Judges of the Court in a unanimous decision.

From the foregoing it must appear that the Beseman case then and there ceased to be an authority; yet if more be needed to satisfy this Court upon that point we will go a step further. The Beseman case again came up for criticism (May Term, 1891), in the case of Methodist Church vs. Penn. R. R. Co. and in which the Court said:

"Complainant is the owner of a church edifice, in
"which its congregation worships and conducts
"other religious exercises, situate on the south
"side of Bridge avenue, between Third and Fourth
"streets, in Camden, and it seeks by its bill to be
"protected against the same sort of injury at the
"hands of defendant which was considered and dealt
"with in Angel v. Pennsylvania R. R. Co., 14
"Stew. Eq., 316, and Thompson v. Pennsylvania R.
"R. Co., 18 Stew. Eq., 870. * * * Counsel also
"relied upon Beseman v. Penn. R. R. Co., 21 Vr.,
"235, decided in the Supreme Court after the Angel
"case and before the Thompson case, and, after the
"Thompson case, affirmed on error, 23 Vr., 221. But
"the opinion of the Supreme Court in the Beseman
"case carefully distinguished it from the Angel
"case, and the opinion of Vice Chancellor Bird in

"Thomson case acted on that distinction, and was "adopted by the Court of Appeals with the assent "of the Judges of the Supreme Court who took part "in the Beseman case.

"It conclusively appears from these cases that the "Court adopts the law as decided by the Court of "Appeals and Errors, in Angel vs. Penn. R. R. Co., "41 N. J. Eq., 317 (14 Stew.) Mch., 1886, and which "decision was also unanimous and in which the "Judges deciding the Beseman case concurred, and "which decision in the Angel case is directly opposed "to that of the Beseman case the Court saying in the "Angel case that a railroad company using, for the "purpose of a terminal yard, a portion of street over "which it has only a right of way, is responsible for "any nuisance, public or private, thereby created, "and an act of the Legislature cannot confer upon "individual or private corporations, acting prima- "rily for their own profit, although for public "benefit as well, any right to deprive persons of the "ordinary enjoyment of their own property, except "upon condition that just compensation be first "made to the owners, and that a railroad company "cannot justify the maintenance of a condition of "things which directly renders a dwelling house in "the neighborhood unfit for a place of residence, "upon the ground that the nuisance necessarily re- "sult from the convenient transaction of the com- "pany's lawful business, and such a nuisance will "be prohibited by injunction."

IV.

Subsequent state decisions cannot change the law as to property rights as fixed by earlier decisions.

The early decisions of the State of New Jersey, made before the plaintiff acquired title to the premises now owned by it, which decisions are set forth

in this brief, fixed and settled the rights of the plaintiff with reference to the railroad company and assured to the plaintiff that its easements were property was secure and could not be taken without payment of compensation, and that damages from noise and smoke and such acts were subject to injunction relief *even if necessary on the operation of the railroad and where there is a diversity of state decisions the first in time will constitute the obligations of the contract and the measure of rights under it.*

The case of Penn. R. R. Co. vs. Angel was decided by the Court of Errors and Appeals, March Term 1886, and years before complainant constructed the addition to the church, purchased ground to build the rectory and purchased ground and built the school building. The Court, in the Angel case, held, "*an act of the Legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their own property, except upon condition that just compensation be first made to the owners and a railroad company cannot justify the maintenance of a condition of things which directly renders a dwelling house in the neighborhood unfit for a place of residence, upon the ground that the nuisance necessarily results from the convenient transaction of the company's lawful business, and such a nuisance will be prohibited by injunction.*" This proposition of law then and there became the law fixing and determining the rights of the property holders with respect to the operation of railroads in their vicinity. Under the decisions of the Supreme Court of the United States in the *Mulhker* 197, U. S., 544, wherein the Court held, "*when the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of*

481, decided Nov., 1870, and also in Tinsman vs. Belvidere, D. Ry. Co., 25 N. J. Law, 255 (Nov., 1855).

light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation." The Courts of New Jersey then and there were precluded and deprived of the privilege of thereafter changing the rule of law to the prejudice of the property holders and irrespective of the question as to whether the Beseman case has been subsequently overruled, while the decisions of the Supreme Court of the U. S. remain in full force and effect, no State decisions can in any way take from the complainant property rights required by it under earlier decisions of the Courts. For this reason, if for no other, the decision in the Beseman case, holding that "a railroad company is not responsible to an owner of land abutting on or near to its tracks for damages incident to the operation of its railroad where the railroad is operated with care and skill" should be entitled to no consideration.

V.

A railroad company is liable to damages and to an injunction restraining injuries whether necessary or unnecessary to the operation of its railroad.

"The defendant it using and purpose to continue "to use the lands immediately adjoining the "complainant's premises, and in which it has a "right of way for the purposes of a terminal yard, "in such a way and to such an extent as to seriously "interfere with the complainant's enjoyment of them "for religious exercises and worship. In this respect "the case is quite within the principle acted upon in "the Baptist Church cases 108 U. S., 317- 337 U. S., "568. I think the complainant is entitled to an in- "junction."

Methodist Episcopal Church vs. Pa. R. R. Co.,
48 N. J. Eq., 455.

In the case of Pennsylvania R. R. Co. vs. Thompson, 45 N. J. Eq., 870, the Court of Errors and Appeals unanimously affirmed the decree holding: "Where the acts of a railroad company, in drilling its cars, &c., amount to a legal nuisance to the owner and occupants of a dwelling house adjacent to the track complained of, it cannot defend and justify such acts on the ground of necessity and adverse user, if the particular track whereon such drilling is done has been laid less than twenty years, although its other and adjoining tracks have been laid and used more than twenty years. The complaint in this case is, that the defendant so manages the engines, cars and trains on its road, opposite the dwelling house of the complainant, in the City of Camden, as to create a nuisance to the complainant. The allegations in the bill are so similar to, and the testimony so nearly corresponds with the testimony in the case of Pa. R. R. Co. vs. Angel, 14 Stew. Eq., 316, that I shall be content with calling attention to that case. In that case the Court of Appeals decided that acts similar to the ones established in this case amounted to a nuisance. And so far as the question raised in this case is similar to the questions raised and decided in that, as I understand the counsel for the defendant, he does not expect me to disregard the law as laid down in that case."

In Trenton Water Power Company vs. Ruff, 7 Vr. (36 N. J. Law), 335, the Court held the destruction of private property, either total or partial, or the diminution of its value by an act of the government directly, and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of the constitutional provision, and the power can only be

exercised under the right of eminent domain, subject to the constitutional limitation of making just compensation.

"The injuries to which immunity from responsibility attaches are such only as arise incidentally "from acts done under a valid act of the Legislature in the execution of a public trust for the public benefit by persons acting with due skill and "caution within the scope of their authority. If "the injury be direct, or the work be done for the benefit of an individual or corporation, with private "capital and for private emolument, the principle "which absolves the parties from liability to action at "the suit of persons injured does not apply even "though the public be incidentally beneficial by improvement."

"In Andrews v. Collerd, 13 Vr., 189, the Chancellor declared as the opinion of this Court that "the proposition that the legislative authority to a "private corporation or an individual to do a work "for its or his own profit, includes authority to use, "at whatever hazard to the persons or property of "others, dangerous materials, provided they be "necessary to the convenient prosecution of the "work, cannot be sustained; that there is an "obvious distinction between the liability of a private corporation to public prosecution for a legalized nuisance, and its liability to a private action "for damages arising from such nuisance; that in "the one case the legislative authority in protection, and in the other it is not. To the same effect is the language of the Supreme Court of the United States in Baltimore and Potowmack Railroad Co. v. Fifth Baptist Church, 108 U. S., 317: 'The acts that a legislative may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public

"have an interest and over which the public have control. The legislative authority exempts only from liability to suits—civil or criminal—at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort experienced by the public at large."

"It must not be gathered from these propositions that all those inconveniences which are the necessary concomitants of the location of railroads in populous neighborhoods, are to be considered civil injuries."

In *Baltimore & P. R. R. Co. v. Fifth Baptist Church*, 108 U. S., 317, the Court held: "If the facts are established which the evidence tended to prove, and from the verdict of the jury we must so infer, there can be no doubt of the right of the plaintiff to recover. The engine house and repair shop of the railroad, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. The hammering in the shop, the rumbling of the engines passing in and out of the engine house, the blowing off of steam, the ringing of bells, the sounding of whistles and the smoke from the chimneys with its cinders, dust and offensive odors, created a constant disturbance of the religious exercises of the church. The noise was often so great that the voice of the pastor could not be heard. The chimneys of the engine house being lower than the windows of the church, smoke and cinders sometimes entered the latter in such quantities as to cover the seats of the church with dust, soot, and soil the garments of the worshippers. Disagreeable odors, added to the noise, smoke and cinders, rendering the place not only uncomfortable, but also unendurable as a place of worship. As a consequence, the congregation de-

"creased in numbers and the Sunday School was "less numerously attended than previously."

"Plainly the engine house and repair shop, as "they were used by the railroad company, were a "nuisance in every sense of the term. They inter- "fered with the enjoyment of property which was "acquired by the plaintiff long before they were built "and was held as a place of religious exercises, for "prayer and worship; they disturbed and annoyed the "congregation and Sunday School which assembled "there on the Sabbath and on different evenings of "the week. *That is a nuisance which annoys and "disturbs one in the possession of his property, ren-* "dering its ordinary use and occupation physically "uncomfortable to him. For such annoyance and dis- "comfort the courts of law will afford redress and "giving damages against the wrongdoer, and when the "cause of annoyance and discomfort are continuous "courts of equity will interfere and restrain the nui- "sance." (Crump v. Lambert, L. R., 3 Eq., 409.) "The right of the plaintiff to recover for the annoy- "ance and discomfort of its members in the use of "its property and the liability of the defendant to "respond in damages for causing them are not "affected by their corporate charter. *Private cor-* "porations are but associations of individuals united "for some purpose and permitted by law to use a "common name and to change its members without a "dissolution of the association. Whatever interferes "with the comfortable use of their property, for the "purposes of their formation, is as much the sub- "ject of complaint as though the members were united "by some other than a corporate tie."

'Here the plaintiff, the Fifth Baptist Church, "was incorporated that it might hold and use an "edifice erected by it as a place of public worship "for its members and those of similar faith meet- "ing with them. Whatever prevents the comfortable

"use of the property for that purpose by the members
"of the congregation or those who, by its permission,
"unite with them in the church, is a disturbance or
"annoyance, as much so as if access by them to the
"church was impeded and rendered inconvenient and
"difficult. The purpose of the organization is thus
"thwarted. It is sufficient to maintain the action
"to show that the building of the plaintiff was
"thus rendered less valuable for the purposes to
"which it was devoted."

"The liability of the defendant for the annoyance
"and discomfort caused is the same as to that of in-
"dividuals for a similar wrong. The doctrine which
"formerly was sometimes asserted, that an action will
"not lie against a corporation for tort, is exploded. The
"same rule in that respect now applies to corporations
"as to individuals. They are equally responsible for
"injuries done in the course of their business by their
"servants. This is so well settled as not to require the
"citation of any authorities in its support."

"It is no answer to the action of the plaintiff that
"the railroad was authorized by act of Congress to
"bring its tracks within the limits of the City of
"Washington, and to construct such works as were
"necessary and expedient for the completion and
"maintenance of its road, and that thus the engine
"house and repair shop in question were thus nec-
"essary and expedient; that the chimneys of the en-
"gine house are higher than required by the build-
"ing regulations of the city, and that as little noise
"and smoke are caused as the nature of the business
"in them will permit."

"In the first place, the authority of the company
"to construct such works as it might deem neces-
"sary and expedient for the completion and main-
"tenance of its road did not authorize it to place
"them wherever it might think proper in the city

"without reference to the property and rights of "others. As well might it be contended that the "act permitted it to place them immediatly in "front of the President's house or of the Capitol, "or in the most densely populated locality. Indeed, "the corporation does assert a right to place its "works upon the property it may acquire anywhere "in the State. Whatever the extent of the author- "ity conferred it was accompanied with this impli- "fied qualification, that the works should not be so "placed as by their use to unreasonably interfere "with and disturb the peaceful and comfortable "enjoyment of others in their property. *Grants of "privileges or power to corporate bodies, like those in "question, confer no license to use them in disregard "of the private rights of others and with immunity "for their invasion.* The great principle of the "common law, which is equally the teaching of "Christian morality, so to use one's property as not "to injure others forbids any other application or "use of the rights and powers conferred."

"Undoubtedly a railroad over the public high- "ways of the district, including the streets of the "City of Washington, may be authorized by Con- "gress, and, when used with reasonable care, it "produces only that incidental inconvenience which "unavoidably follows the additional occupation of "the streets by its cars, with the noises and dis- "turbances necessarily attending their use, no one "can complain that he is incommoded. Whatever "consequential annoyance may follow from the "running of cars on the road with reasonable care "is *damnum absque injuria*. The private incon- "venience in such case must be suffered for the "public accommodations."

"*But the case at bar is not of that nature. It is a "case of the use of the railroad company of its prop- "erty in such an unreasonable way, as to destroy and*

"annoy the plaintiff, in its occupation of its church,
"to the extent of rendering it uncomfortable as a place
"of worship. It admits indeed of grave doubt,
"whether Congress could authorize the company to
"occupy and use any premises within the city lim-
"its, in a way as would subject others to physical
"discomfort and annoyance in the quiet use and en-
"joyment of their property, and at the same time
"exempt the company from the liability to suit for
"damages or compensation, to which individuals
"acting without such authority, would be better
"subject under like circumstances. Without ex-
"pressing any opinion on this point, it is sufficient
"to observe that such authority would not justify
"an invasion of others' property, to an extent which
"would amount to the entire deprivation of its use
"and enjoyment, without compensation to its
"owner. Nor could such authority be invoked to
"justly acts, creating physical discomfort and an-
"noyance to others in the use and enjoyment of
"their property, to a less extent than entire depri-
"vation, if different places from those occupied
"could be used by the corporation for its purpose,
"without causing such discomfort and annoyance."

"The acts that a Legislature may authorize, which,
"without such authorization, would constitute nui-
"sance, are those which effect public highways or
"public streams, or matters in which the public
"have an interest, and over which the public have
"control. *The legislative authorization exempts*
"only from liability to suits, civil or criminal, at the
"instance of the State; it does not affect any claim of
"a private citizen for damages for any special incon-
"venience and discomfort not experienced by the
"public at large.

"Thus in Sinnickson vs. Johnson, 2 Harr., N. J.,
"at 151, it was held by the Supreme Court of New
"Jersey, that an act of the Legislature, authorizing

"an individual to erect a dam across a navigable river, constituted no defense to an action for damages for an overflow caused by the dam."

"It may be lawful," said the Court, "for him (the grantee of the power and his assignees) to execute this act; as far as the public interests, the rights of navigation, fishing, etc., are concerned; he may plead, and successfully plead, the act to any indictment for a nuisance, or against any complaint for an infringement of the public right, but cannot plead it as a justification for a private injury, which may result from the execution of the statute."

"In Crittenden vs. Wilson, 5 Cow., 165, it was held by the Supreme Court of New York that an act authorizing one to build a dam, on his own land, upon a creek or river which was a public highway, merely protected him from indictment for a nuisance. If, said the Court, there had been no express provision in the act for the payment of damages, the defendant would still have been liable to pay them, and the effect of the grant was merely to authorize the defendant to erect a dam, as he might have done, if the stream had been his own, without a grant. In such a case he would have been responsible in damages, for all the injury occasioned by it to others.

"In Brown vs. Cayuga, etc., Railroad C., 12 N. Y., 486, the company was sued for overflowing plaintiff's lands by means of a cut through the banks of a stream which its road crossed. It pleased authority by its charter to cross highways, streams, and that the cut in question was necessary to the construction and maintenance of the road. But it was held that the company was liable for damages caused.

"It would be a great stretch," said the Court, "upon the language, and an unwarrantable impu-

"tation upon the wisdom and justice of the Legislature, to hold that it imports an authority to cross "the streams in such a manner as to be the cause of "injury to others' adjoining property."

"And so the Court adjudged that the company "was under the same obligation as a private owner "of the land and stream, had he bridged it; and "that the right granted to bridge the stream gave "no immunity for damages which the excavation "of its banks for that purpose might cause to others."

"In Commonwealth vs. Kidder, in the Supreme Court of Mass., 107 Mass., 188, a statute of that State authorized the storage, keeping, manufacture and refining of crude petroleum, or any of its products in detached and properly ventilated buildings, especially adapted to that purpose, and it was held that it did not justify the refining of petroleum at any place, where a necessary consequence of the manufacture was the emission of vapors, which constituted a nuisance at common law by their unwholesome and offensive nature."

"Numerous other decisions from the Courts of the several States, might be cited in support of the position that the grant of power and privileges to do certain things, does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges."

"If, as asserted by the defendant, the noise, smoke and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and if that be not possible, they should be removed to some other place where, by their use,

"the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purpose."

"There are many lawful and necessary occupations which by the odors they engender, or the noise they create, are nuisances in the heart of the city, such as the slaughtering of cattle, the training of tallow, the burning of lime, and the like. Their presence near one's dwelling house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits. Slaughter houses, lime kilns and tallow furnaces are, therefore, generally removed from the occupied parts of a city, or located beyond its limits. No permission given to conduct such an occupation within the limits of a city, would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business." Fish vs. Dodge, 4 Denio, 311.

"The fact that the smoke stacks of the engine house were as high as the City Regulations for chimneys required, is no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff's church. In requiring that the chimney should have a certain height, the regulations did not prohibit there being made higher, nor could they release from liability if not made high enough. It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house. If any adjudication is wanted for a rule so obvious, it will be found in the cases of Sampson vs. Smith, 8 Sim., 271, and Whitney vs. Bartholomew, 21 Conn., 212." "The in-

“struction of the Court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. “That might, indeed, be entirely disregarded. *The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for purposes for which it was dedicated and erected.* The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke and odors of the defendant’s shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But as the Court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and *it is the discomfort and annoyance in its use for those purposes, which is the primary consideration in allowing damages.* As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure.” Judgment affirmed.

B. & P. R. R. Co. vs. Fifth Baptist Church,
108 U. S., 317.

In Beach vs. S. I. & Z. Co., 54 N. J. Eq., 79, the Court held: “The Legislature has no power to authorize the maintenance of a nuisance for the promotion of private objects, even upon terms of making compensation. For no authority is necessary for the position that the Legislature is powerless to exact a law declaring that the defendant may have complainant’s mill and water power upon terms of paying them what a

"Court may ascertain it is worth. And I am unable to distinguish such action and that of leaving the complainants to the remedy of repeated actions at law to recover damages as often as they are suffered. In this respect, our system of laws varies from that of England where parliament is omnipotent."

"It is sometimes laid down in elementary works and appears in the opinions of the Courts, that that which is authorized by the Legislature cannot be a nuisance.

"*This is clearly erroneous in the sense in which it is generally understood that which is authorized by the Legislature within the strict scope of the power given cannot be a public nuisance but it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom.* Wood on Nuisance, Sec. 757, p. 1059, and in the note to this section it is said: In Tinsman vs. The Belvidere D. R. R. Co., 25 N. J. Law, 255 (Nov. 1855), the Court places the liability of railroad companies or other companies acting under legislative authority upon the same footing with individuals using their own premises for a similar purpose.

"*The grantee of a franchise for private emolument as a railroad company says the Court may be vested with the sovereign power to take private property for public use on making compensation but it is not clothed with the sovereign's immunity from resulting damages.* This power leaves their common law liability for injuries done in the exercise of their authority precisely where it would have stood if the land had never been acquired in the ordinary way. In Robinson vs. Erie R. R. Co., 27 Barb., 512, the Court held that legislative grant to construct a railroad can give no authority to invade any private right without compensation. "It confers a franchise simply and the title and right

*"of a private corporation but no exemption for wrongs
"to private property."*

Wood on Nuisance, note, sec. 757, pp. 1059 and 1060.

See "Legislative authority confers no such immunity."

1. Lawyers reports annotated (new series) p. 49-60. See note p. 60 for a long line of cases upon this point.

See also Terrill vs. C. & N. Ry. Co., 110 Va., 340, 32 L. R. A. New series 371.

In Baltimore & Potomac Railroad Co. vs. First Baptist Church, 137 U. S., 568-573, the Court held: "Upon the issue of not guilty the "plaintiff and "the defendant respectively, further introduced "evidence similar to that given at the trial of the "former action and stated, in 108 U. S., 318-320: "The Court, at the plaintiff's request, gave the "following instructions to the jury, to each of which "the defendant excepted."

"If the jury find from the evidence that the church "property of the plaintiff described in the declara- "tion, was acquired and held as a place of religious "worship by said plaintiff before the engine house "and repair shop of the defendant was built, and "that said engine house and repair shop, during the "three years immediately preceding the filing of "the declaration, as they then were used by the de- "fendant, rendered it impossible for the plaintiff to "occupy its building with comfort as a place of "public worship; that the hammering in the shop, "the rumbling of the engines passing in and out of "the engine house, the blowing off of steam and "the smoke from the chimneys—with its cinders, "dust and offensive odors—created during said "period a constant and serious disturbance of the "religious exercises of the church; that the noise "was frequently so great that the voice of the pas- "tor while praying or preaching could not be heard;

"that the chimneys of the engine house were, during the three years embraced in this suit, allowed to continue lower in height than the windows of the church, and that smoke and cinders from them were blown into the church in such quantities as to cover the seats with soot and soil the garments of the worshippers; that disagreeable odors, added to the noise, smoke and cinders, rendered the place uncomfortable as a place of worship and unsuitable for the purpose to which it was devoted; then the plaintiff is, as a matter of law, entitled to recover, and it is the duty of the jury to measure in damages the extent of the injury suffered by the plaintiff, their grievances during the three years immediately preceding the bringing of this suit."

"In the estimate of damages the plaintiff is entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, if you find such inconvenience and discomfort to have been occasioned, thus tending necessarily to destroy the use of the building for the purpose for which it was erected and dedicated. The congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes for the three years covered by this suit, which is the primary consideration in allowing damages.

"There may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure."

"The case at bar affords a good illustration of the rule of law, and of its application as stated by Blackstone. Indeed; every continuance of a nuisance is held to be a fresh one and, therefore, a fresh action will lie and very exemplary damages

"will probably be given if, after one verdict against "him, the defendant has the hardness to continue "it."

(3 Bl. Com., 220.) *Judgment affirmed.* 137 U. S., 566.

In First Baptist Church vs. Schenectady & Troy R. R. Co., 5 Barber, 79, the Court held: "This was an "action on the case for a nuisance. The declaration "stated that the plaintiffs were the owners and "lawfully possessed of a lot of land in the City of "Schenectady upon which there had been erected a "building for the purpose of being used as a meet- "ing house or place of religious worship; that the "defendants were the owners and possessors of a "railroad running near and contiguous to the plaint- "iff's premises, upon which they were accustomed "to run their cars and locomotive engines; that on "the 5th of April, 1843, and on divers other days, "between that time and the time of the commence- "ment of the suit, the defendants wrongfully, im- "properly and injuriously, by themselves and their "agents, on the Sabbaths, when the religious soci- "ety or congregation, accustomed to use the said "meeting house, were lawfully assembled therein "and engaged in public and religious worship, by "ringing their stationary bell, contiguous to the "said house of worship, and their bell attached to "their locomotive engines, and by the puffing and "whistles of said engines, and blowing off steam "therefrom while standing near to said house of "worship, and by the rumbling, jarring noises of "their cars and steam engines when moved and "propelled by steam on their railroad, and by the "unlawful and improper use of their railroad on "the Sabbaths disturbed, annoyed and molested "the said religious society or congregation while "engaged in worship, by means whereof the value "of the said house of worship was greatly depreci-

"ated and the same was rendered entirely unfit for
"and valueless as a house of religious worship."

"The defendants pleaded first not guilty, and
"secondly that by an act of the Legislature
"the defendants were authorized and empowered,
"by themselves and their servants, on the Sabbaths,
"when the said religious society or congregation,
"in the plaintiff's declaration mentioned, were
"lawfully assembled in said meeting house and
"lawfully engaged in public and religious worship,
"to ring their stationary bell, etc., etc., and if the
"said religious society or congregation was dis-
"turbed, annoyed or molested by the ringing, etc.,
"or if the value of the said meeting house of the
"plaintiffs had been greatly depreciated, or if the
"same had been rendered valueless or unfit for use
"as a house of religious worship the same had nec-
"essarily and unavoidably happened in the lawful
"use of the defendant's railroad, as they were
"authorized and empowered to use the same by
"virtue of the acts of the Legislature aforesaid.
"To the second plea the plaintiffs replied that the
"defendant, without authority and power, and the
"causes by them in their second plea alleged, com-
"mitted the said several grievances, etc.

"Upon the trial of the plaintiffs proved substan-
"tially the allegations in their declarations. It was
"admitted that the defendants had constructed
"their road in pursuance of the acts of the Legisla-
"ture mentioned in their second plea and that they
"had done what was necessary to obtain, and had
"obtained title to and possession of the land through
"which their road was constructed."

"The defendant's counsel insisted upon the fol-
"lowing points:

"1. That no action for a nuisance could be main-
"tained by the plaintiffs in their corporate capacity,
"against the defendants for any acts done by them

"in the ordinary use of their road in pursuance of
"and by the authority of the Legislature. 2. That
"there was no evidence of any injury to the value
"of the plaintiff's property otherwise than for a
"place of public worship, and that the disturbance
"of the congregation could not affect the plaintiffs,
"as a corporation, but only the individuals as-
"sembled. 3. That if any action could be main-
"tained for a nuisance, it must be brought by the
"individuals affected thereby; and if, as in this case,
"no damage was sustained but that which the law
"presumes every citizen to sustain by a common
"nuisance, then no action would lie. 4. That if
"such action could be sustained at all, it should have
"been brought, not against the defendants as a
"corporation, but against the individuals who
"cause such noises to be made. The circuit judge
"decided that upon the evidence the plaintiffs were
"entitled to recover, and directed the jury to find a
"verdict for the plaintiffs for nominal damages.
"In the examination of this case, I propose first, to
"inquire whether the facts alleged and proved, con-
"stitute a cause of action, and then, if an action can
"be maintained, whether the plaintiffs are the
"proper parties to be sued. These questions in-
"volve all the points presented upon the argument.

"First, then, can an action be maintained for the
"annoyance of which the plaintiffs complained?
"Nuisances are of two kinds, public and private.
"The former are defined to be such inconvenient
"and troublesome offenses as annoy the whole com-
"munity, in general, and not merely some particu-
"lar person. (4 Chitty's Black, 167.) The latter, any-
"thing done to the injury or annoyance of the lands,
"tenements or hereditaments of another (3 Chitty's
"Bl., 216). It is not easy, in every instance, to de-
"termine to which of these clauses an alleged nuis-
"ance belongs. Indeed, there are some cases where

"the offence may be regarded as both public and "private. Thus, if one obstruct a water course so "that the water flows back upon the land of an- "other, it is a private nuisance for which an ac- "tion will lie, and if the overflowing of the land "have the effect as it often does, to render the "neighborhood unhealthy, it is also a public nuis- "ance, and of course the subject of criminal as well "as civil prosecution. And in general, all nuis- "ances which, when injurious to an individual, are "actionable, are, when detrimental to the public, "indictable also. So on the other hand, if a person "sustains some particular damage beyond the rest "of the community, by a public nuisance, he may "maintain his private action for satisfaction, while "at the same time, the public may prosecute crim- "inally for the offence. *The distinction therefore,* "between public and private nuisances, so far "as it relates to civil remedies, is of but "little practical value. In either case the action "is sustained by proof of a wrongful act done "by the defendant, and actual damages result- "ing to the plaintiff from such wrongful act. In "both cases the action is founded upon the great "law of Christian morality which requires every "man to do to others as he would have others do to "him. The same great principle is recognized in "the legal maxim *sic utere tuo, ut alienum non laedas.* "Hence it is, that acts, in themselves lawful, be- "come wrongful in consequence of the time, or "place or manner of performing them. Thus there "are various trades and manufactures, useful and "lawful, when exercised in remote and proper places, "which became nuisances when carried on where "they necessarily incommoded and annoy others. "In accordance with this principle, it has been held "that the erection and use of a smith's forge, or a "lime kiln, or a tobacco mill, or a tannery, or a

“slaughter house in the vicinity of another's house, “whereby it is rendered useless or even uncomfortable for the purposes of habitation, is a wrongful act, for which an action lies (2 Starkie's Ev. "979, tit. Nuisance. 3 Chitty's Black, 216). “The doctrine on this subject is well stated by Chancellor Walworth, in the conclusion of his opinion in the Court for the correction of errors, in Lansing vs. Smith, (4 Wend., 25). “If,” says he, “a person has sustained actual damage by the erection of a nuisance, whether direct or consequential, I am not prepared to say he cannot maintain an action against the wrong doer. If he sustains no damage but that which the law presumes every citizen to sustain, because it is a common nuisance no action will lie. But the opinion I have formed on this point is, that every individual who receives actual damage from a nuisance, may maintain a private suit for his own injury, although there may be many others in the same situation. The punishment of the wrong doer by a criminal prosecution will not compensate for the individual injury; and a party who has done a criminal act, cannot defend himself against a private suit by alleging that he has injured many others in the same way, and that he will be ruined if he is compelled to make compensation to all.” “The action for a nuisance is aptly compared by Mr. Justice Sutherland, in delivering the opinion of the Supreme Court, in the same case of Lansing vs. Smith, (8 Cowan, 146) to an action of slander for words not actionable in themselves, or an action by a master for the beating of his servant, or by a parent for the debauching of his daughter. The wrongful act of the defendant must be shown, but the gist of the action is the special damage. The important question, upon this branch of the case, then is, whether the pleadings and the evidence bring

"the case within these well established principles." "The complaint is, in brief, that the defendants by "the ringing of their bells, and the blowing off steam, "and other noises, in the neighborhood of the plaintiff's meeting house, on the Sabbath, and during the "period of public worship so annoyed and molested the "congregation worshipping there, as greatly to depreciate the value of the house, and render the same entirely unfit for a house of religious worship. The "evidence is sufficient to show that by the disturbances "of which the plaintiff's complain, the usefulness of "their house, for the purposes to which it had been "appropriated, is at least impaired. This is not "seriously controverted by the defendants, but they "insist that they have done no more than by their "charter they were authorized to do, and that therefore, if the plaintiffs have sustained damage by their "acts, it is *damnum abesse injuria*. If this "position is true in point of fact, it is an answer "to the action. If the defendants have only "pursued the path prescribed for them by the "laws from which they derived their existence they have committed no wrongful act. "Though the plaintiffs may have sustained damage "it is indeed, *damnum abesse injuria*; for the "act of law, like the act of God works no "wrong to anyone.

"But I find nothing in the statutes which gives the "defendants existence and prescribe their corporate "powers, which can be construed to justify them in "creating the nuisance of which the plaintiffs complain. They are indeed authorized to make their railroad, and to acquire the land necessary for that purpose. They are also authorized to use their road "for the transportation of passengers and freight. But "in the exercise of this authority they are not to be empt from liability for injuries to others, to the same

"extent as if the railroad had been constructed and used by individuals owning the land, without legislative sanction. If either in the construction or use of the road they commit an act for which an individual, under the same circumstances, would be liable, they too must be held answerable for the consequences. Every corporation takes its powers subject to this implied restriction. Any other doctrine would lead to unimaginable mischiefs. Where, as in this country corporations are too multiplied and so extensively engaged in the various departments of business to hold that they may with impunity do any act for which an individual would be amenable to Justice, would result in the most pernicious consequences."

"Assuming, then, that corporations, like individuals, are answerable for the damage resulting from the wrongs they do, we come back to the question whether the acts complained of, resulting as they did in the injury alleged by the plaintiff, constitute a sufficient cause of action. And upon this question, upon the principle to which I have referred, I cannot doubt that the plaintiffs are entitled to recover. They were disturbed in the lawful enjoyment of their own property. The defendants, in creating that disturbance, were engaged in unlawful business. The acts of which the plaintiffs complain were clearly within the prohibition of the statute relating to the observance of the Christian Sabbath "(2 R. S., 675, 70 Watts vs. Van Ness, 1 Hill, 76). The plaintiffs sustained pecuniary injury as the result of these unlawful acts of the defendants. In these facts I find all the elements necessary to sustain the action. (Myers vs. Malcolm, 6 Hill, 292; Fish vs. Dodge, 5 Denio, 311; Pierce vs. Dart, 7 Cowen, 609; Crittenden vs. Wilson, 5 Id.,

"165. See also Rose vs. Groves, 5 Man and Grander, "61.) In the latter case, the plaintiff carried on "the business of an innkeeper and victualler in a "house which communicated with the river Thames "by a passage and steps, where persons frequenting "the house were accustomed to land from boats. "The defendants were mast and block makers, oc- "cupying adjoining premises. The case showed "that they had placed timbers and spars in the "river in such a manner, at high water, the access "to the plaintiff's house was obstructed. It was "shown that the plaintiff's business had fallen off "since the obstruction. The question left to the "jury was whether the access to the plaintiff's "house had in fact been obstructed by the defend- "ants. The jury having found a verdict for the "plaintiff it was held, upon a motion in arrest of "judgment, that whether the act complained of "was a public nuisance or not the case disclosed a "private injury to the plaintiff sufficient to consti- "tute a cause of action. A similar case is found "in Wilkes vs. Hungerford Market Company (2 "Bing. N. C., 281), where it was held that a book- "seller, having a shop by the side of a public thor- "oughfare, might maintain an action for the loss "he had sustained by the defendant's continuing "for an unreasonable time an authorized obstruc- "tion. Elliotson vs. Feetham (2 Bing. N. C., 134), "was, like that at bar, a case of noisy nuisance. "The plaintiff alleged that he was lawfully pos- "sessed of a dwelling house in which he and his "family dwelt, and where he exercised and carried "on the profession of doctor of medicine and phys- "ician, and that the defendant being possessed of a "certain manufactory for the working of iron, etc., "situate near his dwelling house, made divers large "files and also divers loud, heavy, jarring, varying, "agitating, hammering and battering sounds and

"noises, whereby the plaintiff and his family were
"greatly disturbed, etc.

"In High vs. Thomas (10 Ad. & Ellis, 590), an
"action was sustained for causing offensive smells
"upon the defendant's premises, which came near to,
"in and about the plaintiff's dwelling house." Bliss
"vs. Hall (4 Bing. 183), too, was a case of nuisance
"for carrying on the trade of a candlemaker on
"premises adjoining the dwelling of the plaintiff.
"The defendant pleaded that he had carried on the
"business in the same place for three years before
"the plaintiff became possessed of his messuage.
"Upon demurrer, Vaughan J., said: "The smell
"and noises of which the plaintiff complains are not
"hallowed by prescription." And Bosanquet, J.,
"said: "The defendant has, *prima facie*, a right
"to enjoy his property in a way not injurious to his
"neighbor; but here, on his own showing, the busi-
"ness he carries on is offensive, and he makes out no
"title to persist in the annoyance." (See also Rex
"vs. Neil, 2 Carr. & Payne, 483.) The defendants
"insist that, as the evidence of injury related solely
"to the use of the plaintiffs' house as a place of pub-
"lic worship, it did not entitle the plaintiffs, as a cor-
"poration, to maintain the action. It is true that the
"evidence only shows that by reason of the acts com-
"plained of, the plaintiffs' house is less valuable for
"the purposes of a house of public worship. It does
"not appear that its value would be equally depre-
"ciated for any other object; nor, indeed, but
"that it might be devoted to some purpose for which
"the defendants' noises would not render it less fit.
"But this, I apprehend, is not necessary. So far
"as proof of injury is required, it is enough to show
"that the property has been rendered less valuable
"for the purposes to which the owner has seen fit
"to devote it. As well might the plaintiff in Fish
"vs. Dodge have required to show that her board-

"ing house could not be used in some other way, so "that the noise and smoke of the defendants would "have been less annoying. But in that case, it was "considered enough that the plaintiff had shown "the defendants had so conducted their business, "lawful in itself, that it had proved a great annoy- "ance to the plaintiff. "It is enough," said Chief "Justice Bronson, quoting the language of Lord "Mansfield, that the enjoyment of life and prop- "erty had been rendered uncomfortable." The case "of Squier vs. Gould (14 Wend., 159) upon which "the defendants' counsel relied, does, I think, sus- "tain his position. In that case the action was "brought by the owner of a store. The act com- "plained of was the placing of sand, lime and other "building materials, in the highway, so as to inter- "rupt a free passage to the plaintiff's store, and so "that the dirt and dust blew into the store, and "greatly incommoded and injured the plaintiff, and "damaged his goods and premises. On the trial "the proof was that the store was in fact occupied "by a tenant of the plaintiff, and that in conse- "quence of the annoyance complained of, custom- "ers were prevented from resorting to the store, "and the tenant abandoned it, and that it remained "unoccupied. The suit was brought in a justice's "court where the plaintiff recovered. It was re- "versed on the ground that the evidence of injury "sustained by the tenant, and the loss of customers "by him, was inadmissible. It is clearly to be in- "ferred from the opinion in that case, that if the "plaintiff had declared for the loss of his tenant, and "the consequent loss of his rent--or if the tenant "had brought his action, and had declared from the "injury of his goods and the loss of his customers, "either, and perhaps both actions, might have been "maintained. The defendant's counsel contends "that it was the individuals who assembled at the

"plaintiff's house for worship, and not the corporation owning the house, who was annoyed by the defendant's noise, and therefore that these individuals, and not the corporation, should have been plaintiffs in the action. To make the case of "Squier vs. Gould, an authority to sustain this position, it should have been held that the customers "who would have resorted to the store, but for the "nuisance, and not the owner or tenant, should "have brought the action. In Owen vs. Henman, "(1 Watts & Serg., 548) an action was conceived "upon the principle contended for by the defendant's counsel. In that case the plaintiff alleged "that he was a member of the congregation of the "Old Presbyterian Church of Wysox, and as such "had a right to set in their house of worship, and to "bear divine service, and exercise religious worship "therein, and that the defendant by making a loud "noise in talking, singing and reading, unlawfully "disturbed him in the hearing of the preaching of "a certain clergyman, in so ample and beneficial "manner as he was entitled to do. The opinion of "the Court was delivered by Justice Sergeant. He "says: "The injury alleged is not the ground of an "action. The plaintiff claims no right in the building, or any pew in it, which has been invaded. "There is no damage to his property, health, reputation or person. He is disturbed in listening to a "sermon by noises. Could an action be brought by "every person whose mind or feeling were disturbed in listening to a discourse or any other mental exercise and it must be the same whether in a "church or elsewhere, by the noises voluntary or involuntary of others, the field of litigation would "be extended beyond endurance." And in conclusion he says: "The injury complained of, if against "the will of the officers of the church, is in the nature of a nuisance, or injury to them and it is for

"them to seek redress. "It is well known," he
"further says, that the property of our churches
"and meeting houses, and the superintendence of
"the congregations, and the right to control and
"regulate them, and to prevent improper intrusion
"or interference, by suit or otherwise, is uniformly
"vested in some corporation or trustees, in whom is
"placed the power to enforce the will of the course.
"It is for them to bring actions of trespass, or on the
"case, to regulate the affair of churches, and to
"protect the members in the enjoyment of their
"religious rights and property."

"And I think it is equally clear, that the action
"is properly brought against the defendants. It
"was, indeed, one supposed, that an action for a
"tort would not lie against a corporation. The ar-
"gument by which this document was maintained
"was plausible, though spacious. A corporation, it
"was said, cannot be invested with authority to
"commit a tort. It acts only through individuals,
"as agents, and when those who act for the cor-
"poration transcend its corporate powers, they, and
"not the corporation, must answer for it. By the
"same course of fallacious reasoning, it was
"also held that a corporation could not
"make a binding contract except by writ-
"ing, under its corporate seal. I have
"just had occasion in the Trustees of St. Mary's
"Church vs. Cagger, to refer to the change of the
"rule of law in this respect. It is equally changed
"in respect to wrongs. *The same rule is now ap-*
plied to corporations as to individuals. The act of
the agent is the act of the principal, as much in one
case as in the other. A corporation will be liable
"for an injury done by its servants if, under like
"circumstances, an individual would be responsible.
"(The C. H. & S. H. T. Co. vs. Rutter, 4 Serg. &
"Rawle, 6. The S. R. Co. v. The A. & R. Railroad

"Co., 5 Hill, 170. The Rector etc., of the Church "Ascension vs. Buckhart, 3 Id., 193). In the latter "case the sole point was whether a special action on "the case for an injury could be maintained against "a corporation. We have, then, in the case under "consideration, a wrongful act committed by the "servants of the defendants while engaged in their "business and for which the defendants may be "sued. We have also an injury resulting from "that wrongful act to the plaintiffs for which they "have the right to claim redress in an action on the "case. This is all that is requisite to sustain this "suit." The motion for a new trial must therefore be denied.

First Baptist Church vs. S. & T. R. R. Co., 5 Barb., 79.

VI.

The plaintiff is not compelled to resort to an action at law for damages but may proceed in equity for an injunction.

That a court of equity has jurisdiction to abate a nuisance by injunction without compelling the plaintiff to resort to an action at law for damages. See Carmichael vs. City of Texarkana, 94 Fed. Rep., 561; I. W. Co. vs. Am. Starboard Co., 53 Fed. Rep., 970. The injury to owners of land in which they reside and have fruit and ornamental trees is irreparable; a court of equity is not without jurisdiction to protect them by injunction merely because they might recover damages in actions at law. A. S. & R. R. Co. vs. Godfrey, 158 Fed. Rep., 225.

To confine a party to an action at law would be in effect to perpetuate a nuisance for so long a time as a defendant was willing to pay damages in successive actions at law and would amount to the taking of private property by paying such damages from time to

time as might be recovered, and in violation of the provisions of the Constitution of the United States.

The right of the complainants to maintain an injunction upon the above stated facts has frequently been passed upon by this court. "Any business, however lawful in itself, which, as to those residing in the neighborhood where it is carried on, cause annoyances that materially interfere with the ordinary physical comfort of human existence is a nuisance that should be restrained, and smoke, noises and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it anyone not compelled by poverty to remain, and such offensiveness which makes uncomfortable is a nuisance." Cleveland vs. C. Gas Light Co., 20 N. J. Eq., p. 201: "Where the prosecution of a business, of itself is lawful in the neighborhood of a dwelling house renders the enjoyment of it materially uncomfortable by the smoke and the cinders, or noises, or offensive odors, produced by such a business, although not in any degree injurious to health the carrying on of such a business there is a nuisance that will be restrained by injunction." Ross vs. Butler, 16 N. J. Eq., 294; see, also, Meigs vs. Lister, 23 N. J. Eq., 200.

"The Court will interpose to prevent the prosecution of a lawful trade where it is carried on in such a manner as to injure the adjoining tenant, or render the enjoyment of life within a neighboring house uncomfortable." Walcott vs. Mollie, 11 N. J. Eq., 207.

"Annoying noise to such a degree as to render living in the house uncomfortable to persons of ordinary sensitiveness, is a nuisance and unlawful injury which will be restrained by injunction. If the title of the complainant is not disputed and the injury is clear it is not necessary that the fact of

"nuisance should be established by a verdict at law." *Duncan vs. Hayes*, 22 N. J. Eq., 25.

"An adjacent house owner who, with his family, is seriously annoyed by the loud noises of hucksters selling produce in a public square, and upon sidewalks near his house, which disturb the health and comfort and conversation of the family may enjoin the city from using or authorizing the use of the streets in question for a market place, although the nuisance may be a public one." *McDonald vs. Mayor of Newark*, 42 N. J. Eq., 136.

"A court of equity has jurisdiction to protect by preliminary injunction a dwelling house against a nuisance which renders it uncomfortable, though the existence of such a nuisance is disputed." *Cronin vs. Bloemeke*, 58 N. J. Eq., 313.

VII.

The damages are irreparable and will result in a multiplicity of suits for damages unless restrained by injunction.

"An irreparable injury is one for which there can be no adequate pecuniary compensation, or one which may arise from the nature of the injury itself or where one in which an injunction is required to preserve to us our homes."

Joyce on Injunction, Sec. 36, page 71.

See also *Kerlin vs. West*, 4 N. J. Eq., 449-453.

In *Osborne vs. M. P. R. Co.*, 147 U. S., 248, the Court held: "*Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy, where the injury is destructive of, or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use under color of law but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable.*"

C. & W. R. R. Co. vs. First M. E. Church, 102 Fed. Rep., 85. Affid. 42 C. C. of Appeals, 178.

"By irreparable injury is not meant such injury as is beyond the possibility of repair or beyond "compensation in damages—but that species of injury whether great or small that ought not to be "submitted to on the one hand or inflicted on the "other, and is of such constant and frequent occurrence that no fair or reasonable redress can be had "therefor in a Court of law."

Wood on Nuisance, Sec. 778, p. 1126.

"*A continuing nuisance is an irreparable injury which fact alone is enough to bring them into equity.* * * * The practice in the equity Courts in nuisance cases is to confine the attention "to the question of fact whether a nuisance exists "or not and to assume jurisdiction as a matter "of course.

Pomeroy Eq., Jurisprudence, Vol. 1, Sec. 514, pp. 864-867.

"Irreparable injury such as gives equity jurisdiction, does not mean that the injury complained of is capable of being measured by a pecuniary standard. * * * * *

"Where the extent of the prospective injury is "uncertain or doubtful so as to be impossible to ascertain the measure of just reparation, the injury "is irreparable in a legal sense so that injunction "will lie to prevent it."

Appropriation of another's land constituting a permanent injury to and depreciation of the property is an *irreparable injury* owing to the uncertainty of the measure of damages as the element of and reasonable certainty is wanting.

Wilson vs. Harrisburg, 77 Atl. Rep., 787.

In Beach vs. S. Iron & Z. Co., 54 N. J. Eq., 79, the Court held:

"*There is no principle which will sustain a Court*

"of Equity in refusing an injunction against the maintenance of an established continuing nuisance, and leaving the injured party to his remedy at law. To do so is in effect to permit a party to take his neighbor's property for his own, use it upon terms of making such compensation as a jury shall assess. This is inadmissible.

"A suit at law would not reach a wrong that occurs almost every hour of each day."

"A Court of equity by a comprehensive decree can determine finally and once for all, the entire controversy between the parties, thus avoiding a multiplicity of suits and conserving the public interests."

"No remedy at law would be so complete or efficacious as is a suit in equity in such a case as this one.

"Where irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair or beyond the possibility of compensation in damages, but it must be of such constant and frequent occurrence, that no fair or reasonable redress can be had therefore, in a Court of law."
"Donivan v. Penn. Co., 199 U. S., 279-305.

"Whenever a nuisance becomes a special source of legal injury to an individual he may have an action of damages. Therefore and in cases of continuation equity will compel relief by process of injunction." Moses vs. U. S., 16 App. S. C. 423; 50 L. A. A., 532.

VIII.

The delay in commencing suit does not prejudice the plaintiff's rights or constitute laches.

As every act of nuisance constitutes a new and fresh cause of action a delay in commencing suit for damages for a nuisance beyond the period of the statute of limitations, can in no wise affect, release

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or constitute a waiver for acts of nuisance committed within the period of the statute of limitations.

While affirmative consent by an owner might preclude an action, yet no court so far as we can find, has denied the substantive right to damages merely because of acquiescence.

"Lapse of time, whatever its length, does not 'justify a nuisance to health.'" *Northwestern Fertilizing Co. vs. Hyde Park*, 97 U. S., 659.

There is a wide distinction between acquiescence and affirmative consent and such cases as may be found holding that an affirmative consent by an abutting property owner, might preclude an action to remove a railroad yet we believe that no cases can be found holding that mere failure to act for a period of years is such acquiescence as to bar an action for an injunction and damages.

It appears from the evidence that the church acquired title to one piece of property on Dec. 20, 1884, to another on May 10th, 1893, to another Aug. 11, 1902, to another March 20, 1905.

It further appears from the evidence that up to 1902 the railroad was operated on a trestle and consisted of *but two tracks, and in 1902 a stone embankment was constructed and on which has been placed six more tracks and some eight switches immediately opposite the school and rectory and but sixty feet distant and it further appears that the number of trains have constantly increased from year to year and that since 1902 the tracks between Monmouth and Brunswick streets on Sixth street have been continuously used as a freight yard and terminal for standing freight cars and engines and in drilling engines and cars back and forth in the making up and separation of trains none of which acts can it be said were committed prior to the year 1902 but that all of said acts were subsequent thereto.*

"*Acquiescence in a certain amount of nuisance is not acquiescence in a similar nuisance which is constantly increasing in magnitude and in its destructive effects.* For the same reasons the delay or lapse of time in bringing this suit does not constitute laches." *Woodruff vs. N. B. G. M. Co.*, 18 Fed. Rep., 753.

IX.

The defendant has no prescriptive right.

The railroad is not "now constructed and operated" as it was many years before plaintiff purchased its property. More tracks and switches have been laid and more trains are made up and standing on the tracks since the extension of the freight yard was made on the block opposite plaintiff's property.

"No period of use and occupancy, however, extended and uninterrupted, or under whatever claim of right, will protect a public nuisance, from abatement by the public authorities, or defeat the preventive remedy by injunction to restrain its perpetuation. No prescriptive right to maintain such a nuisance can be acquired." *Joyce on Nuisance*, Chapter 4, p. 78, and cases cited.

"Length of time is not a bar to an action. No right by prescription either as against the public or complainant as one of the public, has been, or could be, vested in defendants, that can defect this suit."

"In order that the enjoyment of an easement in another's land may be conclusive of the right it must have been adverse; that is under claim of title with knowledge and acquiescence of the owners of the land and uninterrupted and the burden of proving this is on the party claiming the easement. If he leaves it is doubtful whether the enjoyment was adverse, known to the owner uninterrupted, it is not conclusive in his favor, (2

"Greene Ev., Sec. 594). *The enjoyment must not only be adverse, but continuous and without interest or change to the greater injury of the owner for the entire period to vest the right and 'knowledge,' means not only knowledge on the part of the owner of the act of occupation and enjoyment and the party occupying and enjoying but also knowledge that the party in fact claims the right of enjoyment adversely to him of the estate thus claimed in the property."*

"Mere delay, therefore, mere suffering time to elapse, without doing anything, is not acquiescence."

Woodruff vs. N. B. G. M. Co., 18 Fed. Rep., 753-789-790. Affirmed on Appeal in U. S. Court of Appeals, Vol. 59, 377.

See also 2 Pom. Eq. Jur., Sec. 965.

See also Lawyers Reports annotated, Vol. 53, p. 891.

"No prescriptive right can be claimed unless for a period determined by the statute of limitations, as to actions for the recovery of lands or an interest therein; adverse possession for a less period confers no right." Washburn on Easements, C. I. Sec. 4, Sec. 24 and 25.

In this State sixty years adverse possession in one instance and thirty years in another must have elapsed.

It appears by the complainant's bill of complaint that the first piece of property acquired by it was in 1884, twenty-six years ago, and other parcels many years later, and for which reason no title by prescription can be asserted or claimed by the defendant as it has not continued for a period to be determined by the statute of limitations as to actions for the recovery of land or an interest therein.

"The fact that an offensive trade was established upon an open common, remote from habitation, will not entitle the owner to continue it after the lands in its vicinity has been built up and occu-

"pied as against persons living in the neighborhood to whom it constitutes a nuisance."

People vs. D. W. L. Works, 82 Mich., 471; 9 L. R. A., 722.

"By lapse of time and undisturbed possession no one gains a right to maintain an offensive trade even as against subsequent incomers. Com. v. "Van Sickle, Brightly, (Pa.), 69. See also Douglass vs. State, 4 Wis., 387.

The above cases are in point when it is remembered that under the decisions cited in this brief a railroad company acquires by its charter no greater rights than an individual.

"Acquiescence, knowledge or failure to complain "is no defense or estoppel."

Joyce on Nuisance, Sec. 485, et seq., pp. 701-708, and cases cited.

"Where nuisance had been in existence for over twenty years the Court denied a *preliminary injunction*, but left the parties in *statu quo* until "hearing could be had on the merits." Atlanta vs. G. R. R. Co., 40 Ga., 471.

"Mere delay unless it amounts to such an acquiescence as amounts to an equitable estoppel will "not deprive a party of his remedy by injunction "although it is a delay of several years." Meigs vs. Lister, 23 N. J. Eq., 199. Carlise vs. Cooper, 21 N. J. Eq., 576.

"The question as to whether a delay long or short "will operate to estop an assertion of a right depends "entirely upon whether the delay has changed their "status." Archibald vs. Sully, 9 H. L., 388.

"The Court will not in the hearing refuse relief "because complainant has delayed his suit, if it is "clear upon the evidence that he ought to have the "relief granted. But delay is often the ground for "refusing a preliminary injunction." Carlise vs. "Cooper, 18 N. J. Eq., p. 247.

"The position is also taken that the complainants had lost their right to relief by long delay—
 "mere delay in applying to the Court is frequently
 "a ground for denying a preliminary injunction and
 "is also a reason for Courts of Equity refusing to
 "take cognizance of a case where there is a remedy
 "at law."

"But where the legal right is settled and the efficacy is a remedy of a Court of Equity is necessary to to complete relief, delay is no ground for a denial of its aid, unless it is complied with such acquiescence as deprives the party of all right to equitable relief."
 Carlise vs. Cooper, 21 N. J. Eq., 576-591.

"Failure to bring action until near the statutory period of limitations does not operate as a consent "so as to prevent an action."

Rush vs. M. L. C. & W. R. Co., 54 Wis., 136.

It appears from the plaintiff's bill that it acquired one piece of property in 1884, another in 1893 and and another in 1898 and the last in 1902.

And if a prescriptive right is asserted it must apply to last parcel of land purchased as well as to first in order to constitute a defense to the bill of complaint.

"Asserting a prescriptive right it is necessary to establish the fact that, during the entire period requisite to gain the right, he has been sending over his neighbor's land a contaminated and polluted atmosphere from his works, and that during all that time the atmosphere has been polluted to an extent equal to that complained of."

Wood on Nuisance, Sec. 721, p. 926."

"Where such a right is acquired he may not increase the pollution."

Wood on Nuisance, Sec. 724, p. 929.

In Penn. R. R. Co. vs. Thompson, 45 N. J. Eq.,

870, the Court of Errors and Appeals held, without considering the testimony in detail, it will be quite sufficient to say, that, although the defendant may have used one or two of its tracks for a longer period than twenty years, and admitting that twenty years' adverse user will, in such case, secure the legal right to the continued adverse enjoyment, it is undisputed that the track, on which the acts complained of have been done, was only laid in the year of 1882. This being so, as I understand the law, the defendant is limited to the manner and extent of its use during the period by which its rights were fixed. It cannot increase or enlarge them, without the consent of the owner of the servient estate. Haskell vs. Wright, 8 C. E. Gr., 389; Baldwin vs. Calkins, 10 Wend., 167, and other cases cited.

*"To establish a prescriptive right it must appear
"that the plaintiff has sustained equal injury during
"the entire period."*

Joyce on Nuisance, Sec. 57.

The question of the increased damage due to the running of more trains had repeatedly been decided by the Courts of New York in the Elevated Railroad actions where some years after the completion of the road the company laid a third rail for express trains and on it operated an increased number of trains.

The question came up in actions in which either the plaintiff or a predecessor in title had recovered damages from the railroad company by reason of the interference with the easement due to the construction and operation of the two tracks, and in these actions the Courts have held, that even after such a recovery the abutting owners had a new cause of action due to the laying of the third track and the operation of an *increased* number of trains thereon.

In Anchincloss vs. Met. El. R. Co., 68 App. Div., 63, the Court held:

"An owner of property abutting on the railroad whose premises have been subjected to an additional burden by the construction of the third track is entitled to an injunction restraining the maintenance and operation of that track until he recovers compensation for the impairment of his easement."

"The erection and operation of the third track involve a further taking of plaintiff's easements, and trains operated on it run past the plaintiff's premises at great speed and increase the obstruction of light and air to such premises, and the trains make a loud and disagreeable noise and cause dust and cinders to be thrown into and upon said premises. That by the erection and operation of the third track substantial diminution in the rental and fee value of plaintiff's premises has been caused."

Knoth vs. Manhattan Ry. Co., 109 App. Div., 802. Affid. 187 N. Y., 243.

X.

Extent of anthracite coal deposits.

Evidence was introduced by the defendant (subject to the objections of complainant), as to the extent of the anthracite coal deposits. This testimony is confined to that of the witness Campbell, and it was shown on his cross-examination that he had no personal knowledge whatever on the subject and that his statements were based entirely upon hearsay and wholly unreliable.

That his conclusions are not justified by the facts, we refer the Court to Encyclopaedia Britannica, Vol. 18, p. 512, Werner Edition, 1905, wherein it is said as to anthracite coal:

"The annual output can reach 50,000,000 tons in

"spite of the waste and can continue at that figure
"for three centuries." * * * "At the eastern end
"of the southern field, for instance, six beds, as yet
"but locally worked by only thirteen collieries, con-
"tained originally 1,033,000,000 tons, of which
"only 54,000,000 have been extracted, leaving
"976, 000,000 still untouched. In a few years the
"annual output will reach 2,000,000 tons and
"might continue at that rate for five centuries."

And in volume 6, p. 57, it is said: "The anthra-
"cite district of central Pennsylvania occupies an
"area of about 650 miles on the upper bank of the
"Susquehanna River. The strata between Pottsville
"and Wyoming are probably about 3,000 feet thick.
"There are from ten to twelve seams. The princi-
"pal one known as the Monmouth or Baltimore
"vein is twenty-nine and one half feet thick at
"Wilkesbarre and in other places exceeds sixty
"feet."

Department of the Interior. United States Geo-
logical Survey, Mineral Resources of the United
States. Calendar year 1910.

At page 27 it is said, the original supply less the
exhaustion at the close of 1910, leaves as the appar-
ent supply still available 3,062,808,972,000 tons, or
99.6 per cent. of the original supply, or in other
words in all the time since coal mining began in the
United States, the draft upon the original supply in-
cluding loss in mining, has amounted to less than
one-half of one per cent. The annual rate of ex-
haustion at the present time as represented by the
production of 1910 is 0.025 of one per cent. of the
supply. The quantity of coal still in the ground
at the close of 1910 was 6,000 times the production
of that year. And at page 28 it is said "anthracite
coal in Pennsylvania, area 480 square miles. Esti-
mated original supply in short tons 21,000,000,000,
production in 1910 short tons 84,485,236, total pro-

duction to close of 1910 short tons 2,180,334,670. Total exhaustion to close of 1910 short tons 4,360,-000,000. Estimated available supply short tons 16,640,000,000."

Report of the Department of Mines of Pennsylvania. Official Document No. 23, for year ending Dec. 31, 1919.

At page 3 it is said, the production of anthracite coal in Pennsylvania for the year 1909 was 80,223,-833 net tons, a decrease from 1908 of 3,319,410 tons. It is estimated by the United States Geological Survey that the amount of anthracite coal still remaining in the ground is approximately 17,000,-000,000 tons, as about one ton is lost for every ton mined, there is still to be mined about one hundred times the production of the present year.

XI.

The acts of the defendant constitute negligence in the operation of its railroad.

While this action is not based upon any allegation of negligence, yet the acts of nuisance of which the plaintiff complains are due to negligence. See ~~point~~ , page 772 plaintiff's brief.

The defendant introduced in evidence as a part of its defence Exhibit D 3, D 4, D 5 and D 6, pages 397 to 405 of the record.

The language in these exhibits is that of the defendant and should, under the rules of law, be construed most strongly against it.

It appears by these exhibits as follows:

D 6, instructions, July, 1890, page 404.

"The bituminous coals contain a large amount of gas which is liberated by heat. This gas, if not consumed, will appear at the stack in the form of black smoke, but, if mixed with a sufficient quantity of air at a high enough temperature, will burn and pass off as a colorless vapor."

"If large quantities of coal are charged at one time, it is impossible to admit enough air, under the required conditions, for the perfect combustion of the large amount of gas generated, hence, the greatest economy of fuel and the discharge of the least smoke, are only to be obtained by firing small quantities of coal at frequent intervals, in order that the amount of air passing into the firebox will be sufficient for the complete combustion of the gases."

"On the long firebox engines when working up to their full capacity, three shovelfuls of coal may be charged at a time without bad results; but at ordinary work and on the short firebox engines good results cannot be obtained if more than two shovelfuls are charged at a time. When doing exceptionally light work not more than one shovelful should be charged at one time."

"As far as practicable, the door should be run on the latch, and after coal is put in, left partially open until it can be closed without causing black smoke to appear at the stack."

"When the throttle is closed and the draft produced by the exhaust ceases, the amount of air passing through the firebox is proportionately reduced, and unless precautions are taken to prevent it a large quantity of black smoke will be discharged; this, too, usually at a time when it is most objectionable, for, when approaching stations, the doors of the cars are often open and the smoke not having the force of the exhaust to carry it up in the air, falls down over the train and fills the cars. In order to prevent this nuisance, when approaching all regular 'shutting off' places, firemen should stop firing long enough before shutting off to permit a good deal of the gas to be consumed. Before the throttle is closed the door should be opened and blower put on and kept on until it can be closed

without black smoke appearing at the stack."

"*It has been proved that by carefully following these instructions, the amounts of smoke will be reduced to such an extent that it ceases to be a serious source of annoyance and complaint.* Firemen must therefore give this matter careful and earnest attention without losing sight of the necessity of maintaining the steam pressure, and their success in firing with as little smoke as possible will be considered one of the first qualifications for their advancement."

The same language is used in D 5, instructions of July 24, 1902, page 402.

"The bituminous coals contain a large amount of gas which is liberated by heat. This gas, if not consumed, will appear at the stack in the form of black smoke, but if mixed with a sufficient quantity of air at a high enough temperature will burn and pass off as a colorless vapor."

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"It has been proved that by carefully following these instructions, the amount of smoke will be reduced to such an extent that it ceases to be a serious source of annoyance and complaint. Firemen must therefore give this matter careful and earnest attention without losing sight of the necessity of maintaining the steam pressure, and their success in firing with as little smoke as possible will be considered one of the first qualifications for their advancement."

The same language is again used in D 4, instructions June 1, 1908, as follows: page 400.

"Large quantities of coal placed in the firebox at one time cool down the fire, cause smoke and waste coal; small quantities at regular intervals will keep the fire bright, prevent smoke and take less coal to keep up steam pressure."

"To prevent smoke and to save coal, the fire door must be placed on or against the latch after firing coal or using the scraper, slash bar or hook, and

when on sidings, in yards, at terminals or before starting."

"Before the throttle is closed, the blower must be used and the door placed on the latch. Fireman must stop firing long enough before steam is shut off to prevent smoke and waste of coal."

The same language is used again in D 3, page 398, instruction March 17, 1910, as follows:

"Large quantities of coal placed in the firebox at one time cool down the fire, cause smoke and waste coal; small quantities at regular intervals will keep the fire bright, prevent smoke and take less coal to keep up steam pressure."

To prevent smoke and save coal, the fire door must be placed on or against the latch after firing coal or using the scraper, slash bar or hook, and when on sidings, in yards, at terminals, or before starting."

"Before the throttle is closed, the blower must be used and the door placed on the latch. Firemen must stop firing long enough before the steam is shut off to prevent smoke and waste of coal.

These instructions agree with the oral testimony of the defendants that by careful firing smoke in quantities to the objectionable can be prevented. Not reduced to a minimum but absolutely prevented.

The allegations of the plaintiff's bill that the acts of the defendant are unreasonable and unnecessary, do not charge that they are negligently done, as they may have been committed after the exercise of all the care and caution possible.

The case of Buhting vs. Pennsylvania Railroad Co., cited in the brief of defendant, was an action which was based entirely upon negligence, and which being alleged, it became the duty of the plaintiff to establish, and in failing to do this, the plaintiff did not make out a case.

"An action lies against a railroad company for

"negligently operating its locomotives in such manner as to cause them to emit *smoke denser and more offensive in quantity and greater in volume than was reasonably required for the proper operation of the railroad* to the injury of the plaintiff's property situated near to the railroad."

Jenkins vs. Pa. R. R. Co., 67 N. J. L., 331.

It will be observed that in the above action was for *negligent* operation of the railroad in allowing its engines "*to emit smoke denser and more offensive in quantity than was reasonably required for the operation of its railroad.*"

What is true of smoke is also true of noise, and if the defendant should contend, which it doubtless will, that it has a right to emit such smoke and make such noises as is reasonably necessary to the operation of *its* railroad (a proposition which we seriously deny) yet it *has no right to emit more smoke or create more noise, as such excess and increase of smoke and noise being more than is actually necessary for the operation of its railroad would be a negligent operation, and without care in the running of its railroad, in so far as it affected the rights of and caused additional damage to the plaintiff by subjecting it to more smoke and noise than would reasonably be necessary in the operation of the railroad.*

That soft bituminous coal can be burned in locomotive engines *without smoke is an established fact as appears by the testimony of the defendant's witnesses as well as by the witnesses called by the complainant.* It appears from the evidence of Robinson, an engineer of thirty-three years' experience, that by throwing one shovelful of coal in the fire at a time and leaving the door open about one inch ninety per cent. of the black smoke would be obviated, and that all of the black smoke in excess of ten per cent. *is due to the carelessness of the fireman and to nothing else,* and that a fire can be started in

an engine at the depot and there will be no necessity of putting in coal for a distance of a mile and a half, which would carry the engine and train to a point far beyond the church property. That the testimony of Robinson is in all respects true we call the attention of the Court to the instructions to firemen issued by the Penn. Railroad Co. (Def'ts. Ex. D 3, 4, 5 and 6) in which instructions it is said: "Small quantities of coal at regular intervals will keep the fire bright and prevent smoke," and to "prevent smoke the fire door must be placed on or against the latch after firing coal." (fol. 20 p. 400 Rec'd)

The defendant's witness Garabrand also testified that to prevent smoke the fireman should throw one shovelful of coal upon the fire and leave the door open about four inches.

Gardner, another witness called by the defendant, testified that he agreed with the statement made by Garabrand. Marshall, another witness called by the defendant, testified that he insisted upon the one shovelful method, and when followed out a very small amount of smoke is emitted, and not enough to be objectionable. Miner, another witness called by the defendant, testified that he adopted the same methods as used by Marshall in his instructions, and by doing this the coal will emit practically no smoke. Rue, still another witness called by the defendant, testified that he agreed with the testimony of Garabrand. We have here the testimony of five witnesses called by the defendant, and also the published instructions issued by the R. R. Co. to its firemen in addition to the testimony of the one witness Robinson, called by the plaintiff, all of whom agree that by leaving the door slightly opened and putting on one shovelful of coal at a time practically no smoke is emitted, and as the witness Marshall, the defendant's instructor of firemen, testified, "never enough to be objectionable."

It appears from the evidence that there is practically no grade from the R. R. terminal extending for some distance beyond the church property. The grade testified to by the witnesses being but six-tenths of one per cent., about thirty feet to the mile. The witness Gibbs, called for the defendant, testified that in going down grade there should be no smoke at all emitted from the engine, and in going up grade there should be very little smoke if there was a very bright fire. The testimony of these witnesses establishes conclusively that the smoke emitted from the engines upon the block opposite the church property is due to *gross negligence*.

It appears from the evidence of the priests connected with the church, the teachers connected with the school and many other witnesses that many engines have stood for long periods of time on the block opposite the church property and during which time they were emitting dense volumes of black smoke, and on many of these occasions Father Kwiatkowski took a memorandum of the date, hour, and number of the engines. It appears from the evidence that police officer Boyle was detailed in connection with police officer Murphy, by the police department and health department to make an investigation and report to the city officials as to the extent of the smoke emitted by the Pa. R. R. Co. engines on 6th Street, and that they started that instigation *before this suit was commenced* and that they made the first investigation July 20, 1910. The subpoena in this action was not served until July 29, 1910, and the bill filed a day or two before. The investigation made by the officers extended over a period of nineteen days from July 20, 1910, to Aug. 9, 1910, during which time *they found one hundred and seven different engines emitting heavy black smoke* and on each of these

nineteen days the officers devoted not over an hour or two a day in their investigations; all of which is set forth specifically and in detail in the testimony of the officers as it appears in the record. If by careful firing black smoke will not be emitted from an engine as was testified to, by the witnesses for the defendant as well as by the witness Robinson, for the plaintiff, then we say, that the *conclusion is irresistible, that the emission of black smoke was as testified to by the officers, by the priests, by members of the congregation and by the teachers in the school as well as all damages sustained by the plaintiff therefrom, was due solely and exclusively to the gross negligence of the defendant and this court should not hesitate to grant to the plaintiff not only such an injunction as the facts warrant, but should compel the defendant to pay to the plaintiff every dollar of damage that the most liberal construction placed on the plaintiff evidence will justify, for the damages, injury and wrong to which the defendant has subjected the plaintiff, wilfully, negligently and outrageously for the past seven years.* Not one word of testimony was offered by the defendant in contradiction, or in explanation of a single word appearing in the testimony in support of the plaintiff's case. The entire testimony on the part of the defendant, being to the effect, that although soft coal by careful firing could be burned without emitting black smoke, yet for such damages as the complainant has sustained by reason thereof, there can be no recovery, because the defendant is a R. R. corporation, and the defendant defiantly continues the emission of black smoke from its engines in front of the church property, down to the present date, and insolently assert the right to continue the same in the future. What we have said as to smoke is also true of the noise due to the ringing of bells, blowing of whistles,

the drilling of cars over the switches, and the blowing off of exhaust steam from engines standing in the freight yard and terminal which it has extended in the last few years, up to and beyond the block where the church property is located, repeatedly compelling the teachers in the school to stop their exercises, and the priests to suspend their sermons in the church.

The negligence and wilful disregard of complainants' rights in the past years is further demonstrated by the testimony of Garabrand wherein he testifies that the emission of black smoke can be obviated by careful firing and "*vigilant supervision*" of the fireman. That no such vigilance was exercised in the supervision of the fireman appears by the testimony of this witness as it appears, that in the year 1909 fifteen firemen were disciplined whereas fifty-three were disciplined in 1910 and forty-seven so far this year. These figures are most significant if the Court will take notice that *this action was not commenced until July 29, 1910*. The testimony of the witness Campbell, for the defendant, we think, should be disregarded by the Court. His testimony throughout shows a feverish desire to assist the defendant and, presumably to earn his compensation for so doing. His disregard of the truth is most apparent. Among other things he testifies that "the D. L & W. R. R. has not a through service and the hard pulling service that the trunk lines have." Just what he meant by a trunk line we do not know, but the Court will take judicial notice of the fact that the D. L. & W. R. R. maintains a through service from Hoboken to Buffalo, a distance of upwards of 450 miles, and it is a matter of public notoriety that the road is "the road of anthracite" and that *the through service from New York to Buffalo is operated without the emission of black smoke from its engines*, and, in fact, any smoke

whatever, and the fact that upon the D. L. & W. R. R. there are many heavy grades and much "hard pulling" is notorious; that the D. L. & W. R. R. have just completed a new cut off at an expense of \$11,000,000 by which the distance from Hoboken to Buffalo is shortened 11 miles, and that the improvement reduces the maximum grade of 60.2 per mile to 29.04 feet. The unreliable character of the testimony of the witness, Campbell, is further demonstrated by the fact that he testifies that the emission of smoke from an engine burning soft coal *is confined to the time when the engine is going down grade and that it does not give off smoke when going up grade*. In this respect he testified directly opposite to that of the five experienced railroad men called by the defendant, and also in direct opposition to the testimony of the experienced railroad man, Robinson, called by the complainant. The worthlessness of his testimony is still further demonstrated by the fact that he testified that the black smoke thrown off by the combustion of soft coal *is simply a colored gas* and differs in no respect from the product of combustion of anthracite coal, except in the first instance the gas is of a dark color, and in the latter instance it is of a light color. A casual glance at the exhibits of soot, cinders and ashes from the engines of the defendant which were collected in the church, rectory and school, will show that the testimony of this witness upon this point is absolutely false and that the exhibits in evidence are certainly of a great deal more substantial substance than "colored gas." *The vast quantities of smoke to which the complainant has been subjected is due to the gross negligence of the defendant.* A feeble effort was made by the defendant to show that the smoke was due to other factories in the neighborhood, but the testimony of Father Kwiatkowski on his direct as well as his cross-examina-

tion, is to the effect that he made a careful examination of the neighborhood surrounding the church to ascertain if there was any factory near enough to the church to cause it any annoyance from smoke and that he found none; the nearest one being several blocks distant, and even that emitting very little or no black smoke. It may be contended by the defendant that the complainant failed to show that the attendance in the church and school has not decreased during the time that the complainant was subjected to these various nuisances, and while it is true that the testimony does not show that the attendance in the church and school decreased from what it was fifteen years ago, when Father Kwiatkowski took charge of the church, but shows that there has been a slight increase in the attendance in the church and school, this fact should have little or no bearing upon the questions before the Court, for the reason that the population of Hudson County has more than doubled in the past fifteen years, and it is but fair to assume that with the population doubling itself in the past fifteen years, that the attendance in the church and school should be double what it was fifteen years ago and not confined to a very slight increase, and that in the absence of the nuisances of which the complainant complains, the church and school would be in a much more prosperous condition, due to increased attendance and one of the class rooms of the school, not entirely vacant and unoccupied, as has been testified to by the head teacher in charge of the school.

The allegations of the complainant's bill that the acts of the defendant are unreasonable and unnecessary, do not charge that they are negligently done, as they may have been committed after the exercise of all the care and caution possible.

*No allegation or proof of negligence
necessary. Richards v. Washington, D.C. U.S.*

The case of Bunting vs. Pennsylvania Railroad Co., cited in the brief of defendant, was an action which was based entirely upon negligence, and which being alleged, it became the duty of the plaintiff to establish, and in failing to do this, the plaintiff did not make out a case,

XII.

Damages recoverable in an equity action up to date of entry of decree.

In the action at law only temporary damages are recoverable as have been sustained up to the time of the commencement of the action, and the plaintiff may bring successive actions until the defendant abates the nuisance.

Uline v. N. Y. & H. R. R. Co., 101 N. Y., 98.

Pappenheim v. M. E. R. Co., 112 N. Y., 436.

Pond v. M. E. R. Co., 112 N. Y., 186.

Plate v. N. Y. C. R. R. Co., 37 N. Y., 472.

Mahon v. N. Y. C. R. R. Co., 24 N. Y., 658.

In a suit in equity, which is the remedy invoked in this case, the plaintiff recovers only his damages up to the entry of judgment and at the same time secures an injunction which prevents the future trespass.

Pappenheim v. M. E. R. Co., 128 N. Y., 436-445.

"In a suit to abate a nuisance and to recover damages caused thereby, such damages only as are proved to have been sustained up to the time of the decree are recoverable."

Carmichael v. City Texarkana, 94 Fed. Rep., 561.

"The plaintiffs were properly allowed to recover damages down to the time of trial. If the action had been simply an action at law for damages, this would have been error; yet as the action was for relief, both in law and equity, it was proper for the Court to allow a recovery for damages down to the day of trial, because when a Court of

"Equity has once acquired jurisdiction of a case
 "it awards all the relief which the nature of the
 "case demands (Madison Ave. Baptist Ch. vs. Bap-
 "tist Ch., 73 N. Y., 95; Henderson vs. N. Y. C. R.
 "R. Co., 78 N. Y., 423; Uline vs. N. Y. C. R. R. Co.,
 "101 N. Y., 109), clearly if the damages had only
 "been given to the commencement of the action,
 "eight years before the trial, the Court of Equity,
 "whose jurisdiction is to do justice in one action,
 "which in law can only be done in a multiplicity of
 "actions, would have fallen short of the full meas-
 "ure of its duty."

Barrick vs. Schifferdisher, 48 Hun, 355.

"The action being in equity it was entirely com-
 "petent for the Court to receive evidence of the
 "damages which had accrued down to the time of
 "the trial and the objection of the defendant to tes-
 "timony relating to damages subsequent to the
 "commencement of the action were, therefore,
 "properly overruled."

Gerow vs. Village of Liberty, 106 App. Div.,
 357.

"While in actions at law the whole cause of ac-
 "tion must have arisen before the commencement
 "of the action, and no relief can be given as to any-
 "thing which occurred subsequently, *such is not the*
"rule in equitable actions. In such an action the
 "Court having obtained jurisdiction of the parties
 "and subject of the action will bring its relief down
 "to the trial and thus make an end of the litigation,
 "so far as it pertains to the matter of controversy
 "between the parties. That is a familiar rule in
 "equity."

Kilborne vs. Supervisors, 137 N. Y., 170-178.

"Where plaintiff seeks in one action both equit-
 able relief by an abatement of the nuisance and
 damages therefor damages may be awarded to the
 time of trial.

Cyclopedie of Law and Procedure, Vol. 29, p. 1273.

XIII.

The motion to amend the bill should have been granted.

It appears, p. 321, transcript, that before the argument of this case before the District Court the complainant made a motion to amend the declaration by changing the allegation of the bill in respect to the location of the defendant's railroad from the "south side of 6th St.," as alleged in the bill, to "south of 6th St.," to conform to the proofs. Such an amendment could have constituted no surprise or prejudice to the defendant as it most certainly knew of the exact location of its own road and which, correctly located, was pleaded in its answer. This motion should have been granted, and the refusal of the Court is not only one of the grounds assigned for error, but is very material, as the judgment specifically enumerates this as one of the grounds for the judgment dismissing complainant's bill.

XIV.

Amount of damages recoverable.

Aside from such an injunction as the established precedents and the evidence, and every element of law and justice warrants, the complainant was entitled to damages consisting of loss of personal comfort to the congregation in the church, the children in the school and the teachers in their residence and home, and the officiating priests residing in the rectory, and also such damages as the evidence shows has been caused to the painting, decorations and furnishings of the church, school and rectory. Upon the question as to the amount of damages which should be awarded for the loss of personal comfort we have precedents as to a church, estab-

lished by the decisions of the U. S. Supreme Court in Church vs. B. & P. R. R. Co., 108 U. S., 317, and again, in a second suit between the same parties, 137 U. S., 568.

In the first case the Court, on appeal, affirmed a verdict of \$4,500 in favor of the church and against the railroad company for loss of personal comfort to and annoyance of the congregation for a period from April 1, 1874, to March 22, 1877. 108 U. S., p. 322. Practically three years. And in the second suit the Court affirmed two verdicts for the same causes, one of \$6,000, covering a period from March 24, 1877, to March 24, 1880, three years, and one for \$7,000 covering a period from June 11, 1880, to June 11, 1883, three years. See 137 U. S., p. 569.

The complainant was entitled to recover damages for the period of six years before the commencement of this action, on July 29, 1910, down to the date of the entry of the decree. The taking of testimony closed Oct. 9, 1911, but as there is in the record *no evidence* of conditions causing annoyance *after July 20, 1911*, (see p. 366 record) *the complainant is entitled to no damages subsequent to that date*. The complainant was therefore entitled to damages for annoyance and discomfort from July 29, 1904, to July 20, 1911, a period of *seven years less nine days*, as the testimony shows conclusively that the annoyances in the church, rectory and school *were continuous throughout that period*. It appears from the records in the two cases just cited that the United States Supreme Court affirmed these verdicts for damages for the annoyance to the congregation in the church. One verdict for \$4,500 for three years annoyance, one verdict for \$6,000 for three years annoyance, and one verdict of \$7,000 for three years annoyance, aggregating \$17,500 for nine years annoyance, which is *\$1,944 a year.*, based

upon the annoyance on Sundays exclusively. The plaintiff in this action is entitled to recover damages for seven years less nine days for annoyance to the congregation in the church, and for the same period for annoyance to the teachers and children in the school, and for the same period for annoyance to the priest in the rectory which, at \$1,944 a year for seven years amounts to \$13,608, and allowing the same amount for the three institutions is \$40,824 for seven years' annoyance, but as the plaintiff is entitled to recover for nine days less than seven years, and as we do not wish to claim one dollar more than is our legal right, as fixed by the Supreme Court of the United States, there should be deducted from this amount damages for nine days, or say one-third of a month, which is 1/36 of a year, and 1/36 of \$1,944 is \$54.00, which deducted from \$40,824 leaves a net balance due to the plaintiff upon the above basis of calculation of \$40,770.00. and there is no reason known to law or in equity wherein the complainants should be awarded one dollar less, especially as it appears from the testimony that the congregation in the church, the priests in the rectory and the teachers and children in the school have been subjected not only to each and every item of annoyance, as enumerated and set forth in the decision of the United States Supreme Court, but have been subjected to many other more serious elements of annoyance and discomfort through the reckless and insolent violation by the defendant of the property rights of the plaintiff and to award a figure less than was awarded by the Supreme Court of the United States in cases of less annoyance, would, in our judgment, be a gross injustice, and particularly should this be so, *as the defendant did not call one witness or introduce one word of testimony in contradiction of or to detract from or minimize either the causes or*

the extent of the nuisances and annoyances testified to by the complainant's witness. The average yearly damage, \$1,944.00, should, in the case of the school be multiplied by five, as there are five school days a week, and in the case of the rectory and church, it should be multiplied by seven, as church services are conducted every day in the week as well as on Sundays, and the rectory is occupied continuously. *The fact stands uncontradicted upon the record that volumes of black smoke from the defendant's engines* not only from passing, but for long periods of times from engines standing upon the tracks opposite the complainant's property, have continuously for the past seven years been poured into and through the school, rectory and church, and that the extensions of the terminal and freight yard since 1901 up to and beyond the complainant's property has been utilized in the drilling of engines back and forth in the making up of trains, and that the noise of bumping of cars, the blowing of whistles, the ringing of bells, the blowing off of exhaust steam, from moving and standing trains in this extension of the terminal and freight yard to and beyond the block whereon the complainant's property is situated, have prevented sleep and interfered with conversation in the rectory—that the teachers in the school have been compelled to suspend the teaching of the children and that the officiating priests in the church have repeatedly been compelled to suspend the church services, and if we may be permitted to repeat what we have heretofore said, *not a word of testimony has been offered or introduced by the defendant in contradiction of the testimony as to the extent of the annoyances or the causes as above set forth.* It further appears from the testimony that the church, school and rectory are in a very blackened and

discolored condition owing to the smoke emitted by the defendant's engine, and that estimates have been made by competent painters and decorators as to the cost of renovation and painting. It appears from the testimony that the cost is as follows: Rambusch for interior of church, \$6,465; Jaroski for interior of school, \$3,046; Jaroski for outside of school, \$720; Jaroski for interior of rectory, \$900, which is for a total of \$11,131.00, *all of which it is necessary to do by reason of the acts of the defendant.* It further appears from the testimony that Father Kwiatkowski was compelled to append \$391.71 to have the soot, cinders and ashes cleaned out of the organ pipes. Adding this figure to the figure of \$11,131.00, we have a total of \$11,552.71, which added to the figure of \$40,770.00 for damages for loss of personal comfort and annoyance to the congregation, children, teachers and priests, we have a total of \$52,292.71, for *every dollar of which according to every rule of law and justice the plaintiff is entitled to judgment.* In addition to these figures it appears from the evidence of Father Kwiatkowski that the complainant has been subjected in the past years to many expenses for painting the church, school and rectory, and for repairs to the leaders and roofs, which have become damaged and full of "pin holes" by reason of the soot from the defendant's engines. These expenses were specified in detail by Father Kwiatkowski in his testimony and amount in the aggregate to \$3,745.32, which added to the amount of \$52,292.71 makes a total of \$56,038.03, but inasmuch as complainant in its bill has asked damages for only \$50,000 we are confined to that amount. As to the amount of \$3,745.32 paid out for repairs and painting we desire to say but one word more. Many thousands of dollars could have been spent in painting during these years, but as testified to by

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Father Kwiatkowski, no sooner did he have painting done, it was, in little or no time blackened and destroyed by the smoke, and there was no satisfaction or encouragement in having the work done, and only such a limited amount was done as became absolutely necessary.

CONCLUSION.

No injunction is sought to restrain the running of the railroad. See prayer of bill. We do not ask to stop the running of the railroad, nor the burning of such coal as the defendant see fit, but we do insist that they be enjoined from dumping soot, cinders, coal, dust, ashes and black smoke from hundreds of passing and standing engines into the windows of complainant's church, school and rectory, which the defendant asserts it has acquired the right to do by prescription. In addition to the evidence that anthracite coal can be burned without smoke the Court will take official notice of the fact that from the burning of anthracite coal these nuisances do not exist, and that many railroads are now successfully being operated without resorting to the use of soft coal, the burning of which is not *necessary* to the operation of the railroad; and even if necessary—it can be burned without the emission of the black smoke of which the plaintiff complains. And as to the noises complained of, we only seek to have enjoined such as the evidence shows to constitute a nuisance. *The Federal Constitution takes precedence of State Constitutions and statutes*—and the time to end this intolerable nuisance has arrived.

The ten thousand parishioners in the church, the nineteen teachers, and the eleven hundred children in the school, and the priests in the rectory connected with the church, come into Court surrounded by every right known to law and justice. We show the complainant deprived of the peace and quietude

of its church, school and rectory. Each of these institutions having been invaded with physical objects smoke, soot, cinders and ashes, thrown into it by the defendant and by noise sufficient to compel repeated cessation of the services in the church, the teaching and lectures in the school, and interrupting conversation and sleep in the rectory—and to prevent a continuance of which the complainant is entitled to the restraining order of the Court, to protect it in its just and legal right to the quiet and peaceable enjoyment of its church, rectory and school, as well as damages for past injuries and losses sustained.

Respectfully submitted,
FRANK M. HARDENBROOK,

Solicitor for and of Counsel with
Complainant-Appellant.

March 12th, 1915.

ROMAN CATHOLIC CHURCH OF ST. ANTHONY
OF PADUA, JERSEY CITY, *v.* THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

No. 269. Argued May 7, 1915.—Decided June 1, 1915.

This court cannot review the judgment of the Circuit Court of Appeals when the complaint alleged diversity of citizenship unless there remain in the complaint, if the averments of such diversity were disregarded, such averments as to existence of rights under the Constitution and laws of the United States as are adequate to sustain jurisdiction.

Inadequacy of averments in the bill to sustain jurisdiction under the Constitution and laws of the United States cannot be cured by showing that the nature and character of the acts relied upon are sufficient to justify the implication that such Constitution and laws were relied upon.

In this case the facts alleged in regard to damages caused by negligent

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operation of its railroad by the carrier defendant exclude affixing to such acts the character of state action so as to bring them within the Fourteenth Amendment.

Quære whether the operation of a railroad, not on a public highway but on private property, can be treated as state action within the meaning of the Fourteenth Amendment.

Appeal from 207 Fed. Rep. 897, dismissed.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Courts of Appeal, are stated in the opinion.

Mr. Frank M. Hardenbrook, with whom *Mr. Marshall Van Winkle* was on the brief, for appellant.

Mr. Albert C. Wall, with whom *Mr. James B. Vredenburgh* was on the brief, for appellee.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Brought in the Circuit Court of the United States for the District of New Jersey and there decided, this case was taken by appeal to the Circuit Court of Appeals for the Third Circuit where the decree of the Circuit Court was affirmed. 207 Fed. Rep. 897. It is here on appeal upon the assumption that the decree of affirmance is susceptible of being here reviewed, and at the threshold because of a motion to dismiss we come to consider whether the assumption of jurisdiction to review has any foundation.

There is no question concerning the jurisdiction of the Circuit Court and of the Circuit Court of Appeals to review the action of that court, since the complaint expressly alleged diversity of citizenship. But as this court has no power under the statute to review the decision of the Circuit Court of Appeals in a case where the jurisdiction of the Circuit Court was invoked alone upon diversity

of citizenship, it follows that whether we have jurisdiction depends upon whether the jurisdiction of the Circuit Court was by the pleadings invoked not alone because of diverse citizenship, but also because rights under the Constitution and laws of the United States were expressly asserted in the pleadings as a basis for jurisdiction. In other words, the inquiry is whether if the averments in the complaint of diversity of citizenship were disregarded, there would yet remain in the complaint such averments as to the existence of rights under the Constitution and laws of the United States as would be adequate to sustain jurisdiction. *Bagley v. General Fire Extinguisher Co.*, 212 U. S. 477; *Weir v. Rountree*, 216 U. S. 607; *Shulthis v. McDougal*, 225 U. S. 561; *Hull v. Burr*, 234 U. S. 712, 720.

The cause of action relied upon was injury inflicted on the property of the complainant and wrong suffered by its officers and agents in their persons occasioned by a nuisance produced by the operation of the trains of the Railroad Company along its tracks alleged to be situated on Sixth Street in Jersey City. The ownership by the complainant of a church, a schoolhouse and other property in the immediate vicinity of Sixth Street, the damage by interruption of light and view and the injury by smoke and dust and cinders were in the bill fully and graphically described. But the only passage in the bill which in any degree whatever gives basis for the assumption that jurisdiction was invoked because of a reliance on rights claimed under the Constitution and laws of the United States is Paragraph XI, which is as follows:

"XI. That the said acts of the defendant have taken from your orator property consisting of the easement of light and air to which your orator is legally entitled, and deprives it of the same without due process of the law, and without just compensation, or any compensation whatever, and that such acts of the defendant in such interference with and appropriation of said property of

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your orator has been, and now is, a violation of the provisions of the Constitution of the United States."

As from any point of view it is impossible because of the vagueness of these averments to escape, to say the least, doubt as to whether the bill asserted rights under the Constitution and laws of the United States which would be adequate to sustain the jurisdiction of the Circuit Court if the allegations of diversity of citizenship were stricken out, it follows that they are insufficient to sustain the claim of jurisdiction, since the rule is that averments to accomplish that result must be expressly and clearly made. *Hull v. Burr*, 234 U. S. 712, 720. Indeed, it is apparent on the face of the paragraph of the bill which we have quoted that it entirely fails even vaguely to manifest the purpose to base the jurisdiction of the court upon the fact that constitutional rights were relied upon. So completely is this the case that the argument made by the appellant to sustain jurisdiction frankly admits that the averments of the bill are inadequate for that purpose, but suggests that the nature and character of the acts relied upon are sufficient to justify the implication that the Constitution of the United States was relied upon as a basis for jurisdiction and thus to cure the insufficiency. Thus in the argument it is said: "While reference to the Constitution in the complaint is not sufficient to invoke jurisdiction, the facts as alleged in the complaint of the acts of nuisance committed by the defendant, the evidence of which is entirely undisputed in the record, show conclusively that the acts of the defendant in permitting black smoke, particles of unconsumed carbon, soot, cinders, ashes, coal dust and noxious and unwholesome gases and offensive odors and vapors from its said engines and locomotives to fall upon or enter into the premises and structures of the complainant in such appreciable quantities as to interfere with the reasonable use thereof and render uncomfortable the reasonable enjoyment of the

same by the complainant and the priests connected therewith, the teachers and children connected with the school and persons using the said respective structures of the complainant" amounted to a violation of the Constitution of the United States.

But even if this impossible assumption were yielded to there would yet be no ground upon which to rest jurisdiction, since the bill contains allegations which would exclude the possibility of implying from the facts alleged that there was an intention to base jurisdiction on rights asserted under the Constitution of the United States. We say this because paragraph XII of the bill unmistakably charges that the acts complained of were the result of the negligence of the carrier in operating its trains, thus excluding the possibility of affixing to them the character of state action so as to bring them within the Fourteenth Amendment. The paragraph in question is as follows:

"XII. That the aforesaid acts, use, occupation of and appropriation by the defendant as aforesaid constitute and are a nuisance to and one of special injury to your orator, and are unnecessary, avoidable and unreasonable, and not necessarily connected with the construction or a reasonable operation of the said railroad, and which acts are continuous, and which will cause great and irreparable loss to your orator and subject your orator to the prosecution of a multiplicity of suits for damages unless the defendant be restrained by injunction from the commission thereof."

It is true that in the opinion of the court below it is said that the case of the complainant was pressed upon it in the argument upon two grounds: wrong resulting from acts of mere negligent operation on the part of the railroad and wrongs necessarily arising from even a careful operation by the railroad of its trains over its tracks situated in the street as alleged in the complaint; But here again

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if we disregarded the pleadings and tested the jurisdiction by the statements in the opinion of the court below as to the arguments urged upon it, the situation as to the absence of a Federal question adequate to confer jurisdiction would be manifested. We say this because the opinion also states that it was established by the proof and not controverted in the argument below that the tracks of the railroad were not on Sixth street as alleged in the bill, but were on a right of way not part of a street, a situation which at once gives rise to the inquiry whether the operation of the road complained of could under this condition be treated as state action within the meaning of the Fourteenth Amendment.

Dismissed for want of jurisdiction.
